Nos. 117, 118, 119, 332, 333 and 334

Supreme Court of the United States

October Term, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED OPENING BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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THE ARGUS PRESS, SEATTLE

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OPINIONS BELOW

This Brief is filed on behalf of The Denver and Rio Grande Western Railroad Company (hereinafter called "the Rio Grande"), as the appellant in Case No. 117, being an appeal from the United States District Court for the District of Nebraska, Omaha Division (hereinafter sometimes called "the Nebraska court"); as an appellee in Cases Nos. 118 and 119, being other appeals from the same decision of the Nebraska court, and as appellee in Cases Nos. 332, 333 and 334, being appeals from the United States District Court for the District of Colorado (hereinafter sometimes called "the Colorado court"). All of the foregoing appeals were consolidated by order of this Court dated October 24, 1955.

The opinions and judgments of the courts below are reported as *Union Pacific R. R. v. United States,* 132 F.Supp. 72 (D.C. Neb.) (Neb. R. 151-179, 210, 211),* and *The Denver & Rio Grande Western R. R. v. United*

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*There are four volumes of Transcript of Record in these appeals, two small unnumbered volumes, and two large volumes designated Vol. I and Vol. II. The pages of one of the small volumes relating to the formal proceedings in the Nebraska case (which will be referred to in this brief as "Neb. R.") are consecutively numbered 1 to 245. The pages of the other small volume relating to the formal proceedings in the Colorado case (which will be referred to in this brief as "Colo. R.") are consecutively numbered 1 to 374. The pages of the two large volumes designated Vol. I and Vol. II constituting the consolidated portion of the Transcript of Record on these appeals are consecutively numbered beginning with Vol. I (pp. 1-912) and continuing to the end of Vol. II (pp. 913-1779). References in this brief to matters contained in the consolidated portion of the Transcript of Record will be designated "Consol. R.," I or II, as the case may be, followed by the appropriate page.

States, 131 F.Supp. 372 (D.C. Colo.) (Colo. R. 279-302, 361). In both of these decisions the three-judge district courts dealt with the validity of an order of the Interstate Commerce Commission dated January 12, 1953 (Consol. R., II, 1595), which was based upon the Report and conclusions of the Commission in *Denver & Rio Grande Western R. R. v. Union Pacific R. R.*, 287 I.C.C. 611 (Consol. R., II, 1518-1594). The formal Order of the Interstate Commerce Commission (Consol. R., II, 1595) is not reported, but for convenience is set forth and printed as Appendix A hereto.

JURISDICTION

The jurisdiction of the Supreme Court to review (by direct appeal) the decisions in the cases above referred to is conferred by 62 Stat. 928, 28 U.S.C. 1253, and by 62 Stat. 961 and 63 Stat. 104, 28 U.S.C. 2101 (b). The following decisions sustain the jurisdiction of this Court: *Pennsylvania R. R. v. United States*, 323 U.S. 588; *United States v. Capital Transit Co.*, 325 U.S. 357; *New York v. United States*, 331 U.S. 284, and *United States v. Great Northern Ry.*, 343 U.S. 562.

The judgment of the United States District Court for the District of Nebraska was entered December 20, 1954 (Neb. R. 210, 211). The Rio Grande filed its Notice of Appeal therefrom in the said District Court February 3, 1955 (Neb. R. 226-228). In compliance with Rule 13 of the Rules of the Supreme Court, the Rio Grande duly served and filed its Statement as to Jurisdiction and caused the record to be filed, and the appeal was duly docketed, being Case No. 117.

Separate notices of appeal from the United States

District Court for the District of Nebraska were duly filed by the Union Pacific Railroad Company, et al. (hereinafter called "the Union Pacific"), being Case No. 118 (Neb. R. 230-237), and by the United States of America (Neb. R. 229-230), the Interstate Commerce Commission (Neb. R. 239-241) and the Secretary of Agriculture (Neb. R. 242-244), being Case No. 119.

The judgment of the United States District Court for the District of Colorado was entered February 1, 1955 (Colo. R. 361, 362). Separate notices of appeal were duly filed by the Washington Public Service Commission, *et al.* (being Case No. 332) (Colo. R. 369-372), by the Union Pacific Railroad Company, *et al.* (being Case No. 333) (Colo. R. 365-369), and by the United States of America and the Interstate Commerce Commission (being Case No. 334) (Colo. R. 364). These appeals were docketed on August 20, 1955.

On October 24, 1955, this Court issued an order noting probable jurisdiction and consolidating the several appeals.

On the 4th day of November, 1955, the parties filed their stipulation, designating the portions of the record to be printed.

QUESTIONS PRESENTED

I. The Nebraska Case

1. Whether the Nebraska court erred in overruling certain findings of fact and conclusions of law of the Interstate Commerce Commission where such findings and conclusions were within the administrative function of the Commission.

2. Whether the Nebraska court erred in holding

in paragraph III of its Conclusions of Law (Neb. R. 167, 168) that there is no substantial evidence to support the findings and order of the Commission which require the establishment of competitive joint rates and through routes between the Union Pacific, the Rio Grande and other railroads with respect to the commodities and the areas specified in the order, thus substituting its own judgment and findings which modified the scope of the relief granted by the Commission, by restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande requiring in-transit privileges at such points, and to be later reshipped to points beyond the Rio Grande.

3. Whether the Nebraska court erred in setting aside, in part, the order of the Commission, which requires the Union Pacific and other defendants before the Commission to participate with the Rio Grande in the maintenance of through routes and competitive joint rates on the commodities described by the Commission between the involved northwest area and points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad, regardless of whether or not transit privileges are used on the Rio Grande.

4. Whether the Nebraska court erred in ruling, contrary to the findings of the Commission and the evidence, that on the commodities specified by the Commission, the through routes and competitive joint rates required by its order via the Rio Grande between the northwest area and points south and east of a designated area which extends northerly and to some extent southerly from Colo-

rado common points, such as Denver, Pueblo and Trinidad, are not needed in order to provide adequate and more economic transportation.

5. Whether the Nebraska court erred in overruling the findings and conclusions of the Commission that as to the commodities specified by the Commission, the existing transportation services and the facilities via the Union Pacific routes were inadequate and uneconomic between the involved northwest area and points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad, and in substituting its own finding that the existing transportation services and facilities via the Union Pacific routes are adequate.

6. Whether the Nebraska court erred in overruling the findings and conclusions of the Commission that the existing rates assailed are and will be unjust and unreasonable, and unduly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential to shippers and receivers using the Union Pacific routes, in and to the extent that such rates exceed, or may exceed, the joint rates maintained on the specified commodities from and to the same points over the Union Pacific routes.

II. The Colorado Case

1. Whether the Colorado court erred in setting aside the order of the Commission and holding that through routes once in existence continue in existence despite the mere cancellation of joint rates over such routes, if the connecting railroads involved continue to offer continuous carriage of goods on through bills of lading from originating

points on the line of one to destinations on the line of the other.

2. Whether the Colorado court erred in holding that in a proceeding to obtain reasonable and nondiscriminatory rates over through routes already in existence, the Interstate Commerce Commission erred in considering itself bound by the limitations of Section 15(4) of the Interstate Commerce Act (which do not apply if through routes are already in existence or if the provisions of Section 3 of that Act are applicable), and thereby prejudiced its approach to the entire case and its consideration of the issues.

3. Whether the Colorado court erred in remanding the case to the Interstate Commerce Commission, to enable the Commission under Sections 1(4), 3(1), 15(1) and 15(3) of the Interstate Commerce Act to correct the discrimination and prejudice practiced by the Union Pacific and the other defendant railroads against the Rio Grande, and to enable the Commission to prescribe future just, reasonable and nondiscriminatory competitive joint rates over the Rio Grande in connection with the Union Pacific and its presently preferred connections, free of the limitations of Section 15(4) of the Act.

STATUTES INVOLVED

These appeals involve the following statutes:

The Interstate Commerce Act, Title 49 U.S.C., particularly the declaration of National Transportation Policy (preceding Section 1), and Sections 1(4), 1(5), 1(15), 3(1), 3(4), 6(1), 13(1), 15(1), 15(3), 15(4), and 15(8); all of which are set forth verbatim in Appendix B hereto.

STATEMENT

The Rio Grande is a common carrier by railroad engaged in the transportation of persons and property in intrastate, interstate and foreign commerce. It operates 2,400 miles of railroad in Colorado, New Mexico and Utah (Consol. R., I, 80). It has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colo., and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. It also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern Railroads; at Colorado Springs with the Santa Fe and the Rock Island; at Pueblo with the Santa Fe, the Colorado and Southern and the Missouri Pacific; at Walsenburg, Colorado, with the Colorado and Southern, and at Trinidad, Colorado, with the Santa Fe and the Colorado and Southern (Consol. R., I, 83-92; see also Map, App. C hereto).

The Union Pacific Railroad with Omaha (Council Bluffs) and Kansas City as its eastern termini extends westward in two lines. The Omaha line runs directly to Wyoming. One line from Kansas City runs northwesterly and connects with the Omaha line east of Kearney, Nebraska, and the other runs from Kansas City, first to Denver, Colorado, and then northerly into Wyoming; and thence both lines through Wyoming westerly to Ogden, Utah (Consol. R., I, 797-799; see also App. C hereto).

At Ogden, Utah, the Union Pacific has two

diverging lines of railroad which are in the shape of a large "Y." One arm of the "Y" extends in a southwesterly direction through Salt Lake City and Provo, Utah, and Las Vegas, Nevada, to Los Angeles, California. Between points on that line and Colorado common points and points east thereof, the Union Pacific and other defendant railroads maintain competitive joint rates and through routes on all freight traffic in connection with the Rio Grande via Salt Lake City and Provo (Consol. R., I, 91). The other arm of the "Y" of the Union Pacific extends in a northwesterly direction from Ogden through Utah to points in Idaho, Oregon, Washington and Montana. This is the "closed door" territory (sometimes called "the northwest area" or "the excluded territory") directly to and from which the Union Pacific and the other defendant railroads herein refuse to maintain competitive joint rates on freight traffic via the Rio Grande through Ogden or Salt Lake City to and from Colorado common points and points east thereof (Consol. R., I, 91, 92, 94; see also Map, App. C hereto), except on sheep and goats from that territory to Missouri River points and east thereof (Consol. R., I, 118, 119) and on lumber to Cañon City, Colorado, and east of Canon City to the first station west of Pueblo as shown in published tariff ICC No. 1474 by Agent Kipp (Consol. R., I, 112; Earley Exhibit 3, Sec. G, p. 2).

Except as to freight traffic moving via the Union Pacific to and from the "closed door" territory above described, the Rio Grande participates generally in the transportation of transcontinental traffic at competitive joint rates on equal terms with the Union Pacific

and other railroads (Consol. R., I, 92). While the Union Pacific is the principal defendant, it is not the only source or the sole cause of the situation sought to be corrected. The other railroad defendants cooperate with the Union Pacific in maintaining the existing restrictions on freight traffic moving to and from the "closed door" territory. Without their cooperation and joint participation, the restrictions would not be effective. The situation sought to be corrected is illustrated by the "closed door" territory shown on the Map, Appendix D hereto, and by the lines of railroads shown on the Map annexed hereto as Appendix C.

Prior to January, 1936, the Union Pacific controlled the Oregon Short Line Railroad Company, the Oregon-Washington Railroad and Navigation Company,* the Los Angeles and Salt Lake Railroad Company and the St. Joseph and Grand Island Railway Company, but at that time these several railroad companies were operated as separate legal entities. In 1932 the Union Pacific applied to the Interstate Commerce Commission for authority to lease and operate the above-named rail roads. That application was approved by the Commission in *Union Pacific Railroad Company Unification,* 189 I.C.C. 357 and 207 I.C.C. 543. As a result of that ap-

*The lines of these two railroad companies substantially serve the "closed door" territory. The Oregon Short Line Railroad Company extends from Salt Lake City through Ogden into Idaho, northwest to Huntington, Ore., north to Butte, Mont.; and east to Granger, Wyo.; the lines of the Oregon-Washington Railroad and Navigation Company extend from Huntington, Ore., to Portland, Ore., into Seattle, Wash. When in 1906 the Union Pacific reacquired control of these railroads, their lines became and have since remained a part of the present Union Pacific system. (Consol. R., I, 798, 799).

proval, the properties of the railroads named have been operated as a single system under lease by the Union Pacific since January, 1936 (Consol. R., I, 90, 799).

In 1897 competitive joint rates and through routes were established in connection with the Rio Grande via Ogden and Salt Lake City between the territories above described, on the traffic from and to points on the Oregon Short Line Railroad Company and the Oregon-Washington Railroad and Navigation Company. This situation continued during the time that these two companies and the Union Pacific were in separate receiverships (Consol. R., I, 84-87). By August, 1906, the Union Pacific had re-acquired control over the Oregon Short Line Railroad Company and the Oregon-Washington Railroad and Navigation Company, and between August, 1906, and December, 1912, it caused the joint rates in effect via the Rio Grande through the Ogden gateway to be cancelled; but no action was taken then or later by the Union Pacific or the other interested railroads to cancel the through routes (Consol. R., I, 87, 88).

Mr. A. J. Stilling, the principal traffic witness for the Union Pacific, unequivocally admitted that through routes via the Ogden gateway and the Rio Grande are now open and available to shippers who are willing to pay through rates based on the aggregate of the intermediate local rates of the various carriers in the routes. Mr. Stilling stated:

> "The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available

today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington. However, most of that traffic originates or terminates at points on the Union Pacific, and it ordinarily moves via the Union Pacific through Wyoming because the joint through rates to and from that territory are restricted so that they will not apply when traffic is interchanged with the Rio Grande at junction points in Utah." (Consol. R., I, 799, 800).

Mr. Elmer B. Collins, counsel for the Union Pacific, made a like admission before the Commission during a colloquy between himself and Chairman Alldredge on the question whether the tariffs which cancelled the joint rates in 1906-12 closed the through routes via the Rio Grande through Ogden (Consol. R., II, 1621). This colloquy was as follows:

"CHAIRMAN ALLDREDGE: Before you start, Mr. Collins, may I ask you a question?

I assume there is no dispute about the fact that from a physical standpoint these routes are open; that is, business physically can be interchanged between the Denver & Rio Grande and the Union Pacific.

MR. COLLINS: Yes, sir; exactly. As was the case in the Western Pacific case.

CHAIRMAN ALLDREDGE: You contend, however, that you have closed this route on the traffic here in question.

MR. COLLINS: That is right.

CHAIRMAN ALLDREDGE: Now, will you tell this Commission exactly how you closed the routes?

MR. COLLINS: We cancelled the joint through rate billing. We provided by tariff publication that

the joint rates would not apply via Ogden with the D.&R.G.W.

CHAIRMAN ALLDREDGE: You provided in the tariff that the joint rates would not apply?

MR. COLLINS: A restriction in the route.

CHAIRMAN ALLDREDGE: That is the joint rate?

MR. COLLINS: Yes, sir.

CHAIRMAN ALLDREDGE: Do you think that closes this route for this traffic?

MR. COLLINS: No, I don't think so, if they want to pay more, if they want a route via the Rio Grande and pay the price."

The undisputed evidence before the Commission shows that many shippers have paid the higher rates where they wanted to use the Rio Grande and that the Union Pacific has never refused to issue a through bill of lading on such shipments. The evidence with respect to through shipments moving over the Rio Grande via the Ogden gateway from and to the "closed door" territory in connection with the Union Pacific may be summarized as follows:

During the period from November 2, 1942 to August 17, 1945, approximately 19,000 carloads of traffic were moved via the Union Pacific and Rio Grande through route into the "closed door" territory from points on the Rio Grande line and from eastern points destined to points in Oregon and Washington which carloads originally had been routed via the Rio Grande and the Western Pacific or the Rio Grande and the Southern Pacific, but which were diverted to the Union Pacific at Ogden or Salt Lake City and were accepted and carried by the Union Pacific as through shipments (Consol. R., I, 70, 71).

During January and February, 1949, when blizzards and snow storms blocked the Union Pacific main line between Cheyenne and Ogden, 4,208 carloads of freight both eastbound and westbound were diverted to the Rio Grande for movement via its line between Denver and Utah junction points and thence via the Union Pacific. Of that number 1,394 carloads originated or were destined to Union Pacific points in the "closed door" territory at which competitive joint rates* were not applicable. During that same blizzard period, the Rio Grande handled 210 carloads of express and 276 carloads of mail between Denver and Salt Lake City for the Union Pacific. (Consol. R., I, 72).

The carload traffic just described was diverted under service orders of the Commission, none of which, however, purported to establish or did establish temporary through routes as specified in Section 15(4) of the Act (Consol. R., I, 72). The traffic was diverted by the Commission to the Rio Grande under Section 1(15) on the apparent assumption that through routes and the facilities for operating such routes already existed and that, therefore, there was no need to establish temporary through routes.

In addition to the traffic that was diverted to the route of the Rio Grande on service orders, a large volume of traffic was initially routed via the Rio Grande on bills of lading via Ogden and the Union Pacific between points in the "closed

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*"Competitive joint rates," sought by the Rio Grande herein, mean such joint rates to and from the "closed door" territory (shown on the Map, Appendix D hereto) as apply via the Union Pacific or via the Union Pacific and its preferred connections, but which the Union Pacific and its preferred connections decline to accord to the Rio Grande.

door" territory and eastern points. For example, during World War II there were several special trains, consisting of troops and military supplies in freight cars, which were handled on freight billing and which consisted of from 30 to 50 cars per train (Consol. R., I, 71).

One train, consisting of 24 cars of military supplies and six passenger cars, moved from Ft. Sill, Okla., in December, 1941, to Ft. Lewis, Wash., via eastern connections, over the Rio Grande through Ogden and the Union Pacific (Consol. R., I, 71).

Another special train, consisting of 50 cars of military supplies and some troops, moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February, 1942, via different eastern railroads in connection with the Rio Grande through Ogden and the Union Pacific. Another special train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., to Ft. Lewis, Wash., in February, 1942, via different eastern railroads, the Rio Grande through Ogden and the Union Pacific (Consol. R., I, 71).

Still another train, consisting of 50 cars of military supplies, etc., moved from Camp Claiborne, La., in February, 1942, to Ft. Lewis, Wash., via the Rio Grande through Ogden and the Union Pacific. Competitive joint rates were applied on all of this traffic and the through charges among the railroads were divided on a satisfactory basis of interline settlements (Consol. R., I, 71).

During the period March, 1942, to May, 1945, the Rio Grande handled 524 carloads of war material from eastern points which were originally consigned to Ogden and Clearfield, Utah, for the purpose of being stored. These cars were diverted to points in the northwest area via the route of the

Union Pacific through Ogden without ever having been unloaded at the original destinations named. Joint competitive rates were applied on this traffic, and the through charges were divided among the interested railroads on a satisfactory basis of interline settlement (Consol. R., I, 71; 72).

In 1948 (a "typical year," as testified by Mr. Hogue, Vice-President of the Rio Grande (Consol. R., I, 76)), 39 carloads of freight moved eastbound from points in the "closed door" territory on through bills of lading issued by the Union Pacific or its connections consigned to Colorado common points, some of which may have been diverted to points east thereof. These cars contained canned goods, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, sheep, roofing, acid, newsprint and canned salmon (Consol. R., I, 74).

The Rio Grande transported 19 carloads of a variety of commodities, such as tractors, canned goods, agricultural implements, furniture, soap, castings, feed, rubber, iron and steel, on through bills of lading issued by eastern railroads which routed the traffic via the Rio Grande to Ogden and thence via the Union Pacific to points in the "closed door" territory. The freight charges were assessed on the basis of the aggregate of the combination of intermediate rates (Consol. R., I, 75).

In addition during 1948, 22 other westbound carloads of various commodities from points east and south of Colorado common points consigned to points in the "closed door" territory were routed on through bills of lading via the Rio Grande and the Union Pacific. Such routings on these cars were detected by the Rio Grande and, because competitive joint rates did not apply via the Ogden gateway in connection with the Union Pacific,

the cars were held temporarily at Denver and Pueblo, Colo., until disposition or rerouting instructions could be obtained from the shippers or from the originating lines (Consol. R., I, 75, 76). Some of the cars were later sent on via routes over which competitive joint rates apply, while the others went forward subject to charges based upon the aggregate of combination rates.

At the Commission hearing in December, 1949, Vice-President Hogue, of the Rio Grande, testified that he used the year 1948 because it was the last calendar year prior to the hearing and that the same situation prevailed to about the same extent in prior years, and had continued to the time of his testifying in 1949 (Consol. R., I, 76).

The Union Pacific maintains through routes and competitive joint rates in connection with the Rio Grande on all transcontinental traffic from and to points in southern California, Nevada and southern Utah via Provo or Salt Lake City — thereby giving shippers in those areas, as against shippers in the "closed door" territory, the opportunity of shipping via the Rio Grande without suffering the penalty of paying a higher combination rate (Consol. R., I, 91, 92).

The map (App. C hereto) pointedly discloses the extent to which the Union Pacific joins with its preferred railroad connections in routes which short-haul it, while refusing to join with the Rio Grande in routes via the Ogden gateway. As will be noted, routes and distances on the map are shown thereon between North Portland, Ore., and St. Louis, Mo. These points have been selected as representative because North Portland is a point on the Union Pacific from

and to which the Union Pacific will short-haul itself via its various northwest connections, and because St. Louis is more or less centrally located in the territory from and to which the Rio Grande is seeking the establishment of competitive joint rates in connection with the Union Pacific through Ogden. Illustrative routes, which include the route of the Rio Grande, may be summarized, in the order of their respective distances, as follows: (Consol. R., I, 101-110; Earley Exhibit 3, Sec. F; Consol. R., I, 844-846, and Consol. R., II, 1046).

It will be noted (App. C hereto) that the short route (Route (1)) between North Portland and St. Louis is via the Union Pacific from McCaminon through Kemmerer, Wyo., to Kansas City, Mo., thence Wabash, via which route the distance is 2,167 miles, and that the distance via the Union Pacific route through Ogden, Utah, via which point many shipments move for transit either at Ogden proper or at other stations on the Union Pacific south of Ogden without charge for the out-of-line haul, is 2,232 miles, or 65 miles longer than the route of the Union Pacific through Kemmerer, Wyo.

The next route in order of distance (App. C hereto, Route (2)) is the Rio Grande route, i.e., via the Union Pacific to Ogden, Utah, the Rio Grande to Denver, Colo., CRI&P to Kansas City, Mo., and Wabash to St. Louis, the distance over which route between North Portland and St. Louis is 2,367 miles, or but 9% longer than the short route of the Union Pacific through Kemmerer, Wyo., and only 6% longer than the Union Pacific route through Ogden.

Taking as examples two of the routes in which the Union Pacific presently participates with its connections at competitive joint rates that accord it only a short haul (App. C hereto, Routes (3) and (9)), we find that these two routes range from 2,405 miles via Spokane and the Great Northern to 3,134 miles via Portland and the Southern Pacific through California, Arizona and New Mexico, and that they are 11% and 45% longer than the short route (Route (1)) via the Union Pacific through Kemmerer, Wyo. In the case of the route via UP-Portland, Ore.; then SP-Santa Rosa, N. M.; then CRI&P-Kansas City, Mo.; then Wabash to St. Louis, Mo.—the circuity is 32% greater than via the Rio Grande route and 45% greater than the short route of the Union Pacific (Route (1)); whereas, as previously pointed out, the Rio Grande route through Ogden would be but 9% longer than Union Pacific Route (1) via Kemmerer, Wyoming.

The Union Pacific accepts a haul of but 8 miles from North Portland to Portland, Ore., in connection with the Southern Pacific; 215 miles to Wallula, Wash., in connection with the Northern Pacific; 311 miles to Marengo, Wash., and 385 miles to Plummer, Idaho, in connection with the Milwaukee Road; and 372 miles to Spokane in connection with the Great Northern and Spokane International; whereas, if the Union Pacific joined in competitive joint rates and through routes via the Rio Grande, it would receive a haul of 851 miles from North Portland to Ogden. If the Union Pacific insisted on its long haul and treated the Great Northern, Milwaukee Road, Northern Pacific, Spokane International and Southern Pacific as it treats the Rio Grande,

it would receive a haul of 1,893 miles to Kansas City via Kemmerer, Wyoming.

Appendix G to this brief based on Section F of Exhibit 3, by Witness Earley of the Rio Grande, and his testimony (Consol. R., I, 101-111), shows typical examples of existing joint rates and distances via routes which the Union Pacific and other defendants in co-operation with each other take less than their respective long hauls.

The foregoing illustrations, based on the testimony, disclose that the Union Pacific freely joins its preferred railroad connections in through routes at competitive joint rates that traverse the northern and southern portions of the United States, as well as in routes which involve hauls of hundreds of miles through Canada, all of which routes may be considered as constituting the circumference of a great circle, but refuses to join in a direct, central route at such rates with the Rio Grande through Ogden, which route may be regarded as the diameter of the circle formed by the longer routes.

From and to points in the "closed door" territory north of Ogden in Utah and south of McCammon in Idaho, as well as from and to points in southern Idaho and northern Utah on the Union Pacific's Malad, Idaho and Cache Valley branches, traffic generally moves through Ogden, Utah, via the Union Pacific. Furthermore, shipments move via Ogden for transit from and to points west of McCammon, Idaho (Consol. R., I, 644, 645, 844-846). The distance between Logan, Utah, just north of Ogden, and Denver, Colo., is 649 miles via the Union Pacific and 679 miles via the Rio Grande (Consol. R., I, 132-135; Earley Exhibit 3, Sec.

K, p. 4, line 1). Therefore, on traffic from, to or via Denver, moving through Ogden, there would be a difference of but 30 miles between the two routes, which difference is insignificant when compared with the total through mileages involved.

The Union Pacific makes particular point of the fact that the mileage over the Union Pacific's short route through Kemmerer, Wyo., between Denver, Colo., and McCammon, Idaho, and points west and north thereof, is 95 miles shorter than the route via the Rio Grande through Ogden; and, in addition, claims that the distances via the Union Pacific route from and to various eastern and southern points in the areas east and south of Denver, as compared with the Rio Grande route, are generally shorter, ranging from a minimum of 33 miles to a maximum of 219 miles (Consol. R., I, 802-805; Stilling Exhibit 25, pp. 3, 5). These advantages in mileage claimed by the Union Pacific are in connection with routes, the total mileages of which range from 623 to 2,537 miles from McCammon, Idaho, and from 1,538 to 3,452 miles from Seattle, Wash.

The Union Pacific throughout the proceedings has undertaken to graphically indicate the above differences in mileage by a map showing the claimed differentials in oblongs thereon. It should be pointed out that neither these mileage differentials nor the map fully represent the facts with respect to the comparative distances.

Actually, the differences in mileage as claimed by the Union Pacific, ranging from a minimum of 33 miles to a maximum of 219 miles, are based upon routes which in several instances are not the "long-haul" routes cus-

tomarily used by the Union Pacific and required by the tariffs. For example, at New Orleans, where the claimed differential in mileage in favor of the Union Pacific route is shown as 33 miles, traffic from and to the "closed door" territory customarily moves and is required to move in most instances over the Union Pacific via its "long-haul" route through Kansas City, thence connections, such as the L&A to Shreveport, La., and KCS to New Orleans, which "long-haul" route via the Union Pacific is 35 miles longer than the route over the Rio Grande and its connections (UP-Ogden, Utah; Rio Grande-Pubelo, Colo.; C&S-Sixela, N.M.; FW&D-Ft. Worth, Tex.; T&P) to New Orleans (Consol. R., I, 132-135; Earley Exhibit 3, Sec. K, pp. 2, 3, 5-15, line 12). In other instances at points east of the eastern boundary lines of the states of Kansas, Oklahoma and Texas, where the Union Pacific under the tariffs customarily requires its "long-haul" route via Missouri River junctions (Consol. R., I, 101-111; Earley Exhibit 3, Sec. F, pp. 1-5), the differences in distance would also be in favor of the Rio Grande route.

Another example of where the differential in mileage does not favor the Union Pacific is on shipments between New Orleans, La., and Logan, Utah (just north of Ogden) from and to which point Union Pacific traffic moves via Ogden, Utah. On such traffic the difference in distance in favor of the Rio Grande route (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; C&S-Sixela, N.M.; FW&D-Ft. Worth, Tex.; T&P) (1,951 miles), as compared with the customary "long-haul" route of the Union Pacific (UP-Kansas City, Mo.; L&A-Shreveport, La.; KCS-New Orleans) (2,051

miles), is 100 miles (Consol. R., I. 132; Earley Exhibit 3, Sec. K, p. 4, line 12). This difference of 100 miles in favor of the Rio Grande route prevails between New Orleans and all other points in the "closed door" territory on traffic moving via the Union Pacific route through Ogden, Utah.

There are many other instances where the Rio Grande route would be the short route. As an illustration, between Malad, Idaho, and Ft. Worth, Tex., the distance via the Union Pacific route (UP-Denver, Colo.; C&S-Sixela, N.M.; FW&D) is 1,449 miles, and via the Rio Grande route (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; C&S-Sixela, N.M.; FW&D) is 1,418 miles, or a distance advantage in favor of the Rio Grande route of 31 miles (Consol. R., I, 123; Earley Exhibit 3, Sec. I, p. 14, line 27). This same difference in favor of the Rio Grande route would also exist between Ft. Worth and all other points in the "closed door" territory on traffic moving via the Union Pacific through Ogden, Utah.

Another illustration of where the Rio Grande route is the short route is between Preston, Idaho, and Oklahoma City, Okla. The distance via the Union Pacific route (UP-Denver, Colo.; AT&SF) is 1,408 miles, and 1,377 miles via the Rio Grande route (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; AT&SF), resulting in a differential of 31 miles in favor of the Rio Grande route (Consol. R., I, 123; Earley Exhibit 3, Sec. I, p. 10, line 7). Here again this difference would exist in favor of the Rio Grande route from and to all points in the "closed door" territory on traffic moving via the Union Pacific through Ogden, Utah.

Other instances could be cited where the Rio Grande route is the short route, but the above illustrations suffice to show the fallacy of the allegation of the Union Pacific that its route constitutes the short route in all cases.

On August 1, 1949, the Rio Grande filed its complaint with the Interstate Commerce Commission against the Union Pacific and more than 200 other railroads. The complaint (Consol. R., I, 1-25), alleged *inter alia*, that the failure and refusal of the defendant railroads to establish competitive joint rates and to maintain the existing through routes via Ogden, Utah, over the Rio Grande on interstate and foreign freight traffic, in carloads and in other quantities, resulted in through rates which were and are excessive, unjust, unreasonable and discriminatory, in violation of Section 1, Section 3 and Section 15 of the Interstate Commerce Act and that such action was and is contrary to the national transportation policy since it deprives the public and the Rio Grande of the use of available and reasonable through routes and rail facilities at just, reasonable and nondiscriminatory joint through rates which are necessary and desirable in the public interest.

In its complaint (Consol. R., I, 1-25), the Rio Grande requested the Commission to enter an order requiring the Union Pacific and other railroad defendants to establish and maintain for the future, just, reasonable, and nondiscriminatory competitive joint rates and to maintain through routes on freight traffic via the route of the Rio Grande through its Colorado and Utah gateways between (a) points on the Union Pacific and its connections in Utah north of Ogden, and in

Idaho, Montana, Oregon and Washington, herein called the "closed door" territory, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg and Trinidad, and points east thereof; and between Utah common points and the "closed door" territory served by the Union Pacific and its connections already described.

The complaint also alleged that the through rates and charges applicable to such traffic between the points described via such through routes were and are based upon the combination of the intermediate, local or other rates, which rates and charges in the aggregate were and are substantially higher than the joint through rates maintained by defendant railroads on similar freight traffic between the same origin and destination places and territories which moves via through routes maintained by the Union Pacific in connection with the other defendant railroads; that the combination rates applicable on the traffic and between the territories described via said through routes over the Rio Grande and defendant railroads were and are unjust, unreasonable and discriminatory and unduly prejudicial as compared with the competitive joint rates maintained by the Union Pacific or via the Union Pacific and the other defendant railroads on like freight traffic over other competitive routes.

Various individual shippers, shipping organizations, flour milling companies, chambers of commerce, lumber and grain shippers, including associations interested in the production of fruits and vegetables, butter and eggs, dried beans, frozen poultry, livestock and other commodities, intervened before the Commission

or testified in support of the complaint of the Rio Grande. Among such interveners and witnesses were the following:

American National Live Stock Association
Colorado Cattlemen's Association
Idaho Cattlemen's Association
National Live Stock Producers Association
Utah Cattle and Horse Growers Association
The Arkansas Valley Stock Feeders Association
The Arnold Milling Company
The Buhler Mill & Elevator Company
The Consolidated Flour Mills Company
Dixie Portland Flour Company
The Arkansas City Flour Mill
The Kansas Milling Company
The William Kelly Milling Company
Lawrence Milling Company, Inc., d/b/a Moundridge Mill & Elevator Company
Light Grain and Milling Company
The New Era Milling Company
The Wall Rogalsky Milling Company
The Walnut Creek Milling Company
Colorado Wool Growers' Association
Executive Committee Utah State Farm Bureau Federation
The Grand Junction Chamber of Commerce
Holly Sugar Corporation
Idaho State Farm Bureau
Producers Live Stock Marketing Association
Idaho Wool Growers Association
The Pueblo Chamber of Commerce
Western Forest Industries Association

Herbert P. Heidel, Manager, American Stores, Inc., Lincoln Packing Division, Pueblo, Colo.

Reginald T. Titus, Vice-President, Western Forest Industries Association, Portland, Ore.

J. A. Hayley, Manager, Monarch Lumber Company, Military Junction, Colo.

Floyde H. Hughes, Purchasing Agent of Independent Lumber Company, Grand Junction, Colo.

Robert C. Johnson, District Manager, Wood Preserving Division, Koppers Company, which treats lumber at Salida, Colo., and at Denver

J. Arthur Knudsen, General Manager, Knudsen Builders Supply Company, Salt Lake City, Utah

M. S. Rosenblatt, President and General Manager, Structural Steel and Forging Company, Salt Lake City, Utah

Lorenzo J. Bott, Brigham, Utah, fabricator and wholesaler of granite and marble

W. H. Snyder, Grand Junction, Colo., retail dealer in monuments

Kenneth G. Self, holder of a large interest in Inter-Mountain Tractor Sales Corporation, Salt Lake City, Utah. Engaged in distributing tractors and other agricultural implements.

D. G. Adams, Branch Manager, J. I. Case Company, Salt Lake City, Utah, which is among largest producers of agricultural implements and farm machinery in the United States. (Consol. R., I, 26 *et seq.*)

A summary of the testimony of typical witnesses appears in Appendix F attached hereto, with appropriate citations to the Transcript of Record.

The Secretary of Agriculture, the Public Utility Commission of Colorado, the Public Service Commission of Utah, and the American Short Line Railroad Association also intervened in support of the Rio Grande (Consol. R., I, 26 *et seq.*).

The Union Pacific and the other defendant railroads denied the material allegations of the complaint and opposed the granting of any relief thereunder.

Among the interveners in support of the Union Pacific were the Public Utilities Commissions of Washington, Oregon, Montana, Wyoming, Nebraska, and Kansas, as well as numerous chambers of commerce, shippers, cities, towns and other public agencies (Consol. R., I, 26 *et seq.*).

The major defenses which the Union Pacific sought to establish may be summarized as follows:

1. That through routes on freight traffic to and from the "closed door" territory over the Rio Grande via the Ogden gateway ceased to exist when the Union Pacific cancelled the joint rates covering said routes (Consol. R., II, 1621).

2. That the Union Pacific offers adequate, efficient and economic transportation on all freight traffic to and from the "closed door" territory, and that there is no public need for the establishment of new through routes for the competitive joint rates sought by the Rio Grande, because the Rio Grande route is not needed to provide adequate, and more efficient or more economic, transportation (Consol. R., I, 899 *et seq.*).

3. That the Rio Grande route is in all instances longer than the route of the Union Pacific to and from the "closed door" territory (Consol. R., I, 802-805).

4. That through routes and competitive joint rates over the Rio Grande via the Ogden gateway in connection with the Union Pacific would result in depriving the Union Pacific of such a large volume of traffic as to seriously impair the Union Pacific's financial ability to continue to properly serve the shippers and the public interest in the "closed door" territory (Consol. R., I, 587, 588).

5. That the existing arrangements between the Union Pacific and its preferred connections with respect to through routes and competitive joint rates (from which the Rio Grande is excluded) are justified because they are mutually beneficial in the sense that the railroads participating in such through routes and competitive joint rates all share in long hauls and short hauls with each other; also that these arrangements are of long standing and therefore should not be a ground for complaint by the Rio Grande (Consol. R., I, 816, 817).

These appeals and the district court decisions below arise out of the Report and Order of the Interstate Commerce Commission of January 12, 1953, which, on the aforesaid complaint of the Rio Grande prescribed competitive joint rates and through routes applicable to certain commodities via the Ogden gateway in Utah over the Rio Grande between points on the Union Pacific and its connections in Washington, Oregon, Idaho, Montana and northern Utah and points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad (Neb. R. 22, 23 and Colo. R. 2; see Map, App. E hereto).

The conclusions of the Commission, made a part of its Order of January 12, 1953, are based upon Sections 15(3) and 15(4) and Sections 1 and 3 of the Interstate Commerce Act. The conclusions appear in the Commission's Report, 287 I.C.C. 611, 659 (Consol. R., II, 1578, 1579), but for convenience, are here reproduced:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and

more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and, on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points

in the northwest area, on the one hand, and points on the Bamberger railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

The Union Pacific and certain of the other railroad defendants assailed the validity of the Commission's order by filing suit in the United States District Court for the District of Nebraska (Neb. R. 3-24).

The Rio Grande intervened as a defendant in the Nebraska case, and as a defendant it supported the validity of the order challenged in the Nebraska court; but in its answer the Rio Grande reserved the right to assail, by suit in a court of competent jurisdiction, the validity of that part of the Commission's order, not assailed in the Nebraska court, which failed and refused to find through routes in existence and to prescribe the competitive joint rates sought by the Rio Grande on all traffic and on all commodities between the points involved in its complaint before the Commission, as well as that part of the Order of the Commission which imposed territorial and other restrictions in the application of said competitive joint rates and through routes prescribed. Such a suit, as hereinafter set forth, was filed shortly thereafter by the Rio Grande in the United States District Court for the District of Colorado.

The Nebraska court sustained the order of the Com-

mission in part, and over-ruled it in part by restricting the application of the rates prescribed by the Commission to shipments via the Rio Grande to be accorded in-transit privileges at points west of such Colorado common points as Denver, Pueblo and Trinidad, and to be later shipped to points east thereof (Neb. R. 167, 168).

The appeal of the Union Pacific (No. 118) (Neb. R. 230 *et seq.*) is based upon the theory that the Nebraska court erred in not reversing *in toto* the order of the Commission of January 12, 1953, instead of merely modifying it.

The appeal of the Rio Grande (No. 117) (Neb. R. 226 *et seq.*) and the appeals (No. 119) of the United States (Neb. R. 229), of the Interstate Commerce Commission (Neb. R. 239) and of the Secretary of Agriculture (Neb. R. 242) are predicated on the contention that the Nebraska court erred in modifying the Commission order of January 12, 1953, by limiting the prescribed rates to shipments requiring in-transit privileges at points on the Rio Grande west of such Colorado common points as Denver, Pueblo and Trinidad.

The Rio Grande, as already indicated, attacked the validity of the Commission's order by filing suit in the United States District Court for the District of Colorado, upon ~~the ground~~ *inter alia* that the refusal of the Commission to consider the case free of the limitations of Section 15(4) and to grant relief as to all commodities and shipments on the basis of the existence of through routes via the Ogden gateway was arbitrary and capricious, contrary to the evidence, and contrary

to law, particularly the provisions of Section 1, Section 3 and Section 15 of the Interstate Commerce Act.

The Rio Grande took no appeal in the Colorado case because the decision was favorable to the Rio Grande, in that it held that through routes are in existence and that the Commission should have so found and should have proceeded to determine the issues, without restricting itself to a consideration of the limitations imposed by Section 15(4) with respect to the establishment of through routes where none exist. The Colorado court remanded the case to enable the Commission to determine the issues involved and the relief requested on the basis that through routes as a matter of fact and as a matter of law are already in existence.

The gist of the Colorado decision is represented by the following pertinent statement in the unanimous opinion of that three-judge court (Colo. R. 294):

> "The Rio Grande was entitled, as a matter of law, to have the Commission find that such through routes had been established, and, in passing on whether the defendants should be required to establish and maintain future just, reasonable and non-discriminatory competitive joint rates, to have the Commission apply the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act, free of any of the limitations imposed by Section 15(4) with respect to establishing through routes."

The final judgment and decree of the Colorado court annulled and set aside the Commission order of January 12, 1953, insofar as it denied relief to the Rio Grande and its intervenors and remanded the cause to the Interstate Commerce Commission for further pro-

ceedings in conformity with the opinion and judgment of the Colorado court (Colo. R. 361, 362).

The appeals of the Union Pacific and others in Nos. 332, 333 and 334 (disregarding the procedural points raised by various motions of the Union Pacific, *et al.*, which inferentially were denied when the Supreme Court noted probable jurisdiction) involve the primary question, whether the Colorado court erred in setting aside the order of the Commission and in holding as a matter of law that through routes exist over the Rio Grande in connection with the Union Pacific via Ogden, Utah, on the traffic and between the origin and destination territories involved in the litigation. If any of the procedural points above referred to are again raised in the opening briefs of the other parties to these particular appeals, they will be dealt with in such reply brief as the Rio Grande may file under the reservation so to do, set forth at p. 35 hereof.

As a result of the foregoing sequence of proceedings, the positions of the parties in this Court may be summarized as follows:

(1) The Union Pacific and its interveners contend that the Colorado court should be reversed; that the Nebraska court should be reversed; that the Commission order should be reversed, and that the Rio Grande should be accorded no relief whatever.

(2) The United States, the Secretary of Agriculture and the Interstate Commerce Commission contend that the Colorado court should be reversed; that the Nebraska court insofar as it modified the Interstate Commerce Commission order should be reversed; and that the Commission order

of January 12, 1953, should be restored and affirmed, leaving the Rio Grande with the relief therein granted.

(3) The Rio Grande and its interveners contend that the Colorado decision should be affirmed and the case remanded to the Commission on the basis that through routes via the Ogden gateway are in existence and that the Rio Grande is entitled to have the case considered and decided by the Commission, free of the limitations of Section 15(4); that the Nebraska court should be reversed and the Commission's order reversed insofar as it denies the relief prayed for by Rio Grande; that in the alternative, in the event that the Colorado court is not affirmed, this Court should reverse the Nebraska decision and affirm the Commission Order.

SEQUENCE OF ARGUMENT IN THIS BRIEF

With a view to carrying out the spirit of the order of consolidation of this Court, entered October 24, 1955, and in accordance with the suggestion made to Rio Grande counsel by the Clerk of this Court in a letter dated November 15, 1955, the Rio Grande, as already indicated, is filing this brief as a consolidated opening brief covering both series of appeals, reserving the right to file a reply brief insofar as necessary to meet contentions advanced in the briefs of the other parties to these appeals, which may not be sufficiently covered in this Consolidated Opening Brief.

The United States in its Jurisdictional Statement in the Colorado case (footnote 6, p. 10 thereof) takes the position that the two series of appeals are interdependent and that this Court will not need to reach the issues

involved in the Nebraska appeals (Nos. 117-119) if it affirms the judgment in the Colorado case. Such a result does not necessarily follow an affirmance of the Colorado case, because the Colorado court in remanding that case to the Commission (131 F.Supp. 372 at 387) annulled and set aside the Commission's order only "insofar as it *denied* and *withheld* relief to the plaintiff and intervening plaintiffs" (Emphasis supplied) (Colo. R. 361). The Colorado court did not annul or set aside the *affirmative* relief which the Commission order accorded the Rio Grande and which was the sole matter under review in the Nebraska case.

The jurisdiction of the Nebraska court was only invoked to deal with that part of the Commission's order which granted affirmative relief to the Rio Grande. This relief was limited to the prescription of through routes and competitive joint rates on certain named commodities, and was also restricted territorially (Consol. R., II, 1595-1597; see also Map, App. E hereto). The Nebraska court imposed further limitations upon the relief granted by the Commission, by limiting the joint rates prescribed on the named commodities to shipments requiring in-transit privileges at points on the Rio Grande (Neb. R. 167, 168).

However, the Colorado court held that through routes are in existence as a matter of law, as claimed by the Rio Grande, and that the failure of the Commission to so hold had prejudiced its approach to the entire case and improperly caused it to treat itself, in granting relief, as restricted by the limitations of Section 15(4) (Colo. R. 279 *et seq.*).

On this basis, an affirmance by this Court of the Colo-

rado decision could properly involve sending the entire matter back to the Commission in a remand broad enough to require the Commission to reapproach the entire case upon the basis that through routes are in existence. Such a remand by this Court would carry with it the issues dealt with by the Nebraska court to such extent that this Court would not reach or need to deal with those particular issues. In the absence of such a broad remand by this Court, the issues involved in the appeals in the Nebraska case would need to be disposed of independently.

Because of the foregoing unusual situation, and because an affirmance of the Colorado decision as indicated could avoid the necessity of having to deal with the issues in the Nebraska case, it is logical and may better serve this Court, so far as this Consolidated Opening Brief is concerned, to argue the questions presented on the appeals from the Colorado decision prior to the questions arising in connection with the Nebraska case. Accordingly, the Rio Grande argument on the merits will be directed first to the issues involved in the Colorado case. The argument on the issues raised by the Nebraska case appears *infra*, pp. 86-116.

SUMMARY OF ARGUMENT

Colorado Decision

In *Missouri & Illinois Coal Co. v. Illinois Cent. R.R.*, 22 I.C.C. 39, the inherent purpose and policy of the Interstate Commerce Act, with special reference to Sections 1(4) and 3(4) of the Act, was cogently stated by the Commission as follows:

"Reading these provisions together, there can

be no doubt as to the intent of Congress. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

The Commission's view of the inherent purpose and policy of the Interstate Commerce Act was confirmed by Congress and extended to all of the provisions of the Act in its statutory declaration of National Transportation Policy as set forth as a preamble to the Interstate Commerce Act, United States Code, Title 49 (App. B. hereto, 1).

In 1897 when the Oregon Short Line Railroad Company and the Oregon-Washington Railroad and Navigation Company were not under the control of the Union Pacific, they published competitive joint rates via the Rio Grande through Ogden on all freight traffic which moved between points on those railroads, now operated under lease by the Union Pacific Railroad, and Colorado common points and the territory east thereof. That action was in accord with the underlying policy of the Interstate Commerce Act.

By 1906 the Union Pacific had reacquired control of the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company, and between 1906 and December, 1912, the Union Pacific caused the competitive joint rates via Ogden and the Rio Grande which had been established in 1897 to be canceled; but no action was taken then or later by the Union Pacific or

its preferred railroad connections to cancel or close the through routes via the Rio Grande.

In spite of the higher rates, a substantial amount of freight traffic has continued to move on through bills of lading via the Ogden gateway over the Rio Grande to and from the "closed door" territory, with the consent and knowledge of the Union Pacific and its presently preferred connections. The evidence is undisputed that many shippers pay the higher rates where they want to use the Rio Grande, and that the Union Pacific and the other defendant railroads involved never refused to issue a through bill of lading for such shipments (see Statement, *supra* pp. 13-17).

Both the principal traffic witness of the Union Pacific and counsel for the Union Pacific admitted that through routes via the Ogden gateway over the Rio Grande are open and available to shippers who are willing to pay through rates based on the aggregate of the intermediate local rates of the various carriers in the route (see Statement, *supra* pp. 11-13).

That the cancellation of joint rates does not cancel through routes was recently emphasized in *United States v. Great Northern Ry.*, 343 U.S. 562, 572.

This Court has also rejected as without legal significance the contention of a railroad that through routes which are said to be "commercially closed" as a result of higher and discriminatory rates are not through routes within the meaning of the Interstate Commerce Act. *Virginian Ry. v. United States*, 272 U.S. 658.

Upon the foregoing facts and authorities (and other authorities referred to in its opinion), the Colorado

court correctly held that the Commission erred in failing to find that through routes over the Rio Grande via the Ogden gateway in connection with freight traffic moving to and from the "closed door" territory are in existence.

The Colorado decision further held that the Commission erroneously treated itself as bound by the limitations of Section 15(4) of the Interstate Commerce Act, thereby subjecting its consideration of the whole case to the limitations of that section, which only apply to the establishment of through routes where none already exist.

Under its Final Judgment and Decree, the Colorado court annulled and set aside the order of the Interstate Commerce Commission insofar as it denied and withheld relief to the Rio Grande and the other intervening plaintiffs. The Commission, in denying and withholding relief, mistakenly regarded Sections 1(4), 3(4), 15(1) and 15(3) of the Interstate Commerce Act as subject to the limitations of Section 15(4), and thereby failed properly to apply those sections to the issues in the case.

Section 1(4), which requires a common carrier to furnish transportation upon reasonable request and to establish just and reasonable rates, fares, charges and classifications, is not subject to the limitations of Section 15(4) of the Act. *Atchison, T. & S. F. Ry. v. United States,* 279 U.S. 768, 777; *Virginian Ry. v. United States,* 272 U.S. 658, 666.

Section 3(4) of the Interstate Commerce Act which

requires carriers by railroad to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines; and forbids them to discriminate between connecting lines in their rates, fares and charges, is not subject to the limitations of Section 15(4) of the Act. *United States v. Great Northern Ry.*, 343 U.S. 562, 574, 575; *Great Northern Ry. v. United States*, 81 F. Supp. 921, 924 (D.C. Del.), aff'd 336 U.S. 933.

Section 15(1) implements Sections 1(4) and 3(4) of the Act by empowering the Commission to prescribe just and reasonable railroad rates, fares and charges and just, fair and reasonable classifications and practices, in order to correct unjust, unreasonable, unjustly discriminatory or unduly preferential or prejudicial rates, fares, charges, classifications or other practices.

Section 15(3) of the Act authorizes and requires the Commission, "whenever deemed by it to be necessary or desirable in the public interest," to establish through routes and joint rates, fares and charges. The limitations of Section 15(4) do not apply to the establishment of joint rates, fares and charges over through routes which are already in existence. *United States v. Great Northern Ry.*, 343 U.S. 562, 576. However, the Commission erroneously considered its power to establish joint rates, fares and charges under Section 15(3) as limited by the restrictions of Section 15(4).

The Colorado court was, therefore, correct in holding that the Interstate Commerce Commission erred in the following particulars:

(1) In failing to hold, under the undisputed

evidence that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and

(2) In narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, since that section does not apply where (a) through routes are in existence, or (b) where under the evidence of the case, and as a matter of law, relief should be granted under Sections 1(4), 3(4), 15(1) or 15(3) of the Act.

A remand of the case as ordered by the Colorado court is the appropriate procedure for enabling the Commission to correct its several errors.

Nebraska Decision

The Commission in its order of January 12, 1953, prescribed competitive joint rates and through routes on granite and marble monuments from origins in Vermont and Georgia to destinations in the "closed door" territory, and on a limited number of commodities eastbound via the Union Pacific through Ogden or Salt Lake City from the "closed door" territory to points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad, without the imposition of any conditions with respect to the stopping of shipments at points in-transit for loading, unloading, cleaning, milling, storing, fabrication, etc.

The Nebraska court sustained the order of the Commission in part, and overruled it in part by restricting

the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande and requiring in-transit privileges at such points.

In modifying the Commission's findings, the Nebraska court entered the field allocated to the exclusive jurisdiction of the Commission and erroneously substituted its judgment with respect to the weight and significance of the evidence for the judgment of the Commission. Only questions of law, including those affecting constitutional power, statutory authority and basic prerequisites of proof can be raised against an order of the Commission. *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 140, 145, 146; *Atchison, T. & S. F. Ry. v. United States,* 284 U.S. 248, 262; *O'Keefe v. United States,* 240 U.S. 294, 303; *ICC v. Union Pacific R. R.,* 222 U.S. 541, 547; *ICC v. Chicago, R. I. & Pac. Ry.,* 218 U.S. 88, and *ICC v. Illinois Cent. R. R.,* 215 U.S. 452.

The court below erroneously assumed that the primary need with respect to the named commodities covered by the Commission order was for in-transit privileges at points on the Rio Grande, whereas in fact the primary need was and is for competitive joint rates via the Rio Grande so that its route can be used and cars stopped at points on the Rio Grande or at points on other railroads east of the Rio Grande, if so desired by shipper. The facts before the Commission show without dispute that in-transit privileges already exist on the Rio Grande and its connections with respect to all the named commodities, but that competitive joint rates are necessary to make these privileges effective.

The Commission, in its administrative capacity, so decided.

The Commission correctly understood what the Nebraska court did not, that such existing in-transit privileges are commercially ineffective unless the freight which is accorded in-transit privileges may move from the original points of shipment to ultimate destinations at competitive joint rates.

The Nebraska court erred in interpreting and applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) and its implementing Section 15(1) were inapplicable to the facts in the instant case.

Section 3(1) of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of the Act—

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *"

The Nebraska court erred in holding that Section 3(1) does not apply to the instant case, even though the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the violations of that section.

In this connection the Nebraska court misconceived the decision of the Supreme Court in *Central R.R. of N.J. v. United States*, 257 U.S. 247. The court's error arose from its failure to grasp that the wrongs which the Rio Grande and the intervening complainant shippers sought to have the Commission correct could not exist, unless the other defendant railroads joined the Union Pacific in establishing and maintaining competitive joint rates and through routes with each other while refusing to include the Rio Grande in such rates.

A finding of undue prejudice and preference as between the territories and regions involved is sustained where, as here, the defendants singly or jointly, directly, or indirectly through connecting lines, serve the same origins or destination points or territories. *New York v. United States*, 331 U.S. 284; *Chicago, I. & L. Ry. v. United States*, 270 U.S. 287; *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136; *Southern Ry. v. United States*, 204 Fed. 465 (Commerce Ct.); *Seneca Wire & Mfg. Co. v. Baltimore & O. R.R.*, 112 I.C.C. 95, and *Lake Dock Coal Cases*, 89 I.C.C. 170.

In dealing with Sections 15(3) and 15(4) the lower court erred in assuming that the question of public interest and of "adequate, and more efficient or more economic, transportation," as a purely legal proposition, must be confined to shipments requiring in-transit privileges on the Rio Grande, since the question of what is in the public interest and what constitutes adequate and more efficient transportation is, under the facts of this case, an administrative question with respect to which the Commission has exclusive jurisdic-

tion and is not a legal question to be determined by the court.

The errors of the Nebraska court requiring a reversal of its decision therefore may be briefly summarized as follows:

(1) It substituted its judgment for the judgment of the Commission with respect to administrative findings made by the Commission and supported by substantial evidence.

(2) It misinterpreted and misapplied Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, particularly in holding that Section 3(1), which prohibits any carrier from giving undue preference to any person, locality, territory or region, or subjecting any person, locality, territory or region to any undue prejudice, does not apply in the instant case.

Disposition of the Consolidated Appeals

In view of the consolidation of the Colorado and Nebraska appeals, there immediately follows as a part of this Summary a brief statement, amplified in the Conclusion at the end of this Consolidated Opening Brief, as to what, in the opinion of Rio Grande counsel, would be an appropriate disposition of the appeals herein.

I.

The decision of the United States District Court for the District of Colorado involved in appeals Nos. 332, 333 and 334 should be affirmed, with appropriate directions to the Interstate Commerce Commission; the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117,

118 and 119 should be reversed, and the order of the Interstate Commerce Commission should be set aside insofar as it denies the relief sought by the Rio Grande.

II.

In the alternative, in the event that the decision of the United States District Court for the District of Colorado is not affirmed, the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117, 118 and 119 should be reversed and the order of the Interstate Commerce Commission should be affirmed.

ARGUMENT

COLORADO DECISION

I.

Geographic and Economic Background of This Litigation

For a proper understanding of the argument in connection with the Colorado decision it is appropriate to review the geographic and economic situation underlying this litigation.

The "closed door" territory in Northern Utah, Idaho, Montana, Washington and Oregon is a large and developing area of the United States (Consol. R., I, 178 *et seq.*), which the Union Pacific claims as its own principality, to and from which it asserts the right to control the movement of railroad traffic and with respect to which as a matter of whim or otherwise it asserts the right to prefer certain railroad connections. In so doing the Union Pacific discriminates

against the Rio Grande and the intervening shippers and excludes the Rio Grande from traffic moving to and from the area, unless the shippers (the public) are willing to pay a higher price.

As to freight traffic moving to and from the "closed door" territory, the Union Pacific with the aid of its preferred connections claims the right to say to shippers that they may ship over Union Pacific lines to and from Colorado common points and east thereof at competitive joint rates, or that they may ship at competitive joint rates via the Union Pacific and its preferred connections by routes longer than the distances via the routes of the Rio Grande through Ogden.

The extent of this situation is disclosed by the routes heretofore described in the Statement in this brief, pp. 17-20, and illustrated by the map attached hereto as Appendix C. The effect of this situation is that the Union Pacific maintains a monopoly with respect to the movement of railroad traffic to and from the "closed door" territory. It asserts the right, free from any authority of the courts or otherwise, to grant or withhold to other railroads equality as to rates and interchange practices as it sees fit. This is contrary to the provisions of and the policy underlying the Interstate Commerce Act, which requires railroads to act together to constitute one national coordinated system of transportation, of which the Rio Grande is as much a part as any other railroad.

The Interstate Commerce Act as a matter of broad policy intends that there shall be no discrimination in rates and charges between connecting railroad lines,

whereby the public is coerced into employing one competing line to the exclusion of another, and a monopoly is thus created in favor of one particular railroad. This principle was set forth in *New York & No. Ry. v. New York & N. E. R. R.*, 3 I.C.C. 542, 550, in the following words:

> "When, therefore, the Statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the Statute it is only a meaningless enactment. * * *"

The Rio Grande's complaint before the Interstate Commerce Commission (filed August 1, 1949) directly challenged this over-lordship exercised by the Union Pacific and its preferred connections with respect to the business and economic life of a territory greater in extent than the combined areas of New England, New York, Pennsylvania and Maryland. As already indicated, a number of interested shippers, organizations and public service commissions intervened. After the taking of voluminous testimony, the Interstate Commerce Commission through its present Chief Examiner, who heard all of the testimony, rendered a report in favor of the contentions of the Rio Grande. Numerous exceptions to the Examiner's Report were filed, followed by comprehensive briefs by the parties

directly involved (the Rio Grande and the Union Pacific); and by various intervenors on each side.

II.

No Clear Commission Decision with Respect to the Existence of Through Routes

On January 12, 1953, the Commission made its Report and Order—the Order specifically making the Report a part of the Order, by reciting in the Order that the "report is hereby referred to and made a part hereof" (Consol. R., II, 1595). This Report and Order, with certain territorial limitations, accorded relief to the Rio Grande and to the interested shippers with respect to certain named commodities but denied relief with respect to all other commodities shipped to and from the Union Pacific's "closed door" territory (See Map, App. E hereto). Among the ten commissioners who participated in the Commission decision (one, Commissioner Knudsen, not participating (Consol. R., II, 1592)), there was a wide difference of opinion, and several varying separate written opinions were filed (Consol. R., II, 1579 *et seq.*).

Although there was a concurrence of six Commissioners in the measure of relief granted as to the named commodities, there was an even division of opinion — five to five—on what was alleged in the complaint and treated by all of the Commissioners as the first and basic issue of the case, namely, whether as claimed by the Rio Grande through routes are in existence via the Ogden gateway in connection with the Union Pacific so as to entitle the Rio Grande to relief apart from Section 15(4) of the Act, which imposes limitations on the

Commission with respect to the establishment of through routes where none exist. The limitations of Section 15(4) were summarized by this Court in *Thompson v. United States*, 343 U.S. 549, 552, as follows:

> "The Commission's power to establish through routes is limited by a provision of §15(4), quoted in the margin, whenever such action would require a carrier to short haul itself. Under that Section, a carrier may be required to short haul itself only where its own line makes the existing through route 'unreasonably long as compared with another practicable through route which could otherwise be established,' or where the Commission makes special findings that a proposed through route 'is needed in order to provide adequate, and more efficient or more economic, transportation.'"

A reference to the Commission Report (287 I.C.C. 611) (Consol. R. II, 1579 *et seq.*) shows:

(1) That Commissioner Patterson *concurred in part*, but held the Report inconsistent in failing to grant relief on lumber;

(2) That Commissioner Arpaia *concurred* in the Report and Order as made, and though he *held that through routes existed*, voted to limit the competitive joint rates to the commodities specified in the majority Report;

(3) That Commissioner Lee *concurred in part*, but *held that through routes existed*, and would extend the relief;

(4) That Commissioner Mahaffie (with whom Commissioners Splawn and Cross joined) *dissented in part*, but *held that through routes existed*, and would extend the relief.

The minute order entered by the Commission on January 12, 1953, reads as follows:

> "Report and order in the above-entitled proceeding approved and adopted; Commissioner Arpaia concurring, Commissioners Lee and Patterson concurring in part, Commissioners Mahaffie, Splawn and Cross dissenting in part, and Commissioner Knudsen not participating."

Whatever is otherwise said of what was decided or not decided as to the existence of through routes, it is apparent that there was no clear decision by a majority of the Commission on this first and foremost question —*the existence of through routes, via the Rio Grande through the Ogden gateway in connection with the Union Pacific*—and that the failure of the Commission to clearly decide this question colored and distorted its whole approach to the case.

The Colorado court held that under the evidence before the Commission and by reason of the admissions of counsel and of the principal traffic witness of the Union Pacific, through routes exist as a matter of law, and that the Commission in considering the issues erred in imposing upon itself the necessity of proceeding under the stringent limitations of Section 15(4) (Colo. R. 279 *et seq.*). Hence, the Colorado court remanded the case to the Commission for further proceedings in accordance with the law as determined by that court with respect to the existence of through routes.

III.

The Existence of Through Routes Via the Ogden Gateway Is the First and Basic Issue

The existence of through routes via the Rio Grande through the Ogden gateway in connection with the Union Pacific, was from the beginning and is now the first and basic issue ~~in this litigation~~. The Rio Grande, as the original complainant, alleged the existence of such through routes (Consol. R. I, 6). The Commission admitted that the existence of through routes was the first issue in the case to be decided (Consol. R., II, 1523 *et seq.*), but never clearly decided it (Consol. R., II, 1579-1592). The Colorado court recognized the existence of through routes as the first and basic issue, and decided it in favor of the Rio Grande as a question of law. The Nebraska court assumed through routes were not in existence and acted on the assumption that new through routes must be established, and hence that Section 15(4) was the law governing the case.

The Rio Grande was and is entitled to have the basic issue in the case as presented to the Commission by its complaint resolved and decided independently and on its own merits. The Commission not having done so because of an equal division of opinion, the Rio Grande was and is entitled to a specific decision on this question by the courts.

The question of the existence of such through routes, although originally a mixed question of fact and of law, becomes a pure question of law where the evidence, as the Colorado court found in this case, is undisputed. Therefore, the Commission's failure to resolve this

question is not merely a failure to make an administrative finding. Although in the first instance the question was one for the Commission, yet after the underlying facts are established by undisputed evidence, either the failure of the members of the Commission to decide the basic issue in the case, or an erroneous decision of that issue (if it be argued that a decision was made) calls upon a court to examine into the matter and decide upon the whole record whether through routes are in existence as a matter of law. *Thompson v. United States,* 343 U.S. 549; *ICC v. Northern Pacific Ry.,* 216 U.S. 538. This is exactly the issue which the Colorado court had to deal with, and it decided this basic issue in favor of the Rio Grande.

IV.

Under the Law and the Evidence, Through Routes Via the Ogden Gateway Exist

As already indicated (see Statement, *supra* p. 11) the record discloses that through routes and joint rates to and from the points here involved were established in 1897. The joint rates continued until cancelled by the Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. Admittedly, no specific action was taken to cancel the through routes. However, the Union Pacific seems to contend that the mere cancelling of the joint rates cancelled the through routes by somehow closing them "commercially." But there is no law to support what the Union Pacific contends in this particular. On the contrary, it has been definitely indicated by the Supreme Court that the cancellation of a joint rate does

not cancel a through route. This was recently (1952) emphasized in *United States v. Great Northern Ry.*, 343 U.S. 562, at page 572, where the Court said:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this Court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes."

To the same effect are the decisions in *Thompson v. United States*, 343 U.S. 549; *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.), aff'd. 336 U.S. 933; *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768; *Virginian Ry. v. United States*, 272 U.S. 658, and *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136. In the last cited case, Justice Brandeis stated in a footnote that:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; * * *."

This statement by Justice Brandeis in the *St. Louis Southwestern* case is a judicial determination of what constitutes a through route under the provisions of the

Interstate Commerce Act: The court below in deciding that through routes exist was governed by that determination.

In *Routing via Quanah, A. & P. Ry.*, 220 I.C.C. 137, 139, the Commission acted on the theory that the cancellation of a joint rate does not cancel a through route; it went on to hold that when a joint rate is cancelled it is the duty of the railroads to leave in effect through combination rates which are just, reasonable and otherwise in accordance with the standards of the Interstate Commerce Act. Upon review by a three-judge court, the foregoing proposition in the *Quanah* case was sustained in *Thompson v. United States*, 20 F.Supp. 827 (D.C. E.D. Mo.).

The principle that the cancellation of a joint rate does not cancel an existing through route likewise is supported by *Quanah, A. & P. Ry. v. Atchison, T. & S. F. Ry.*, 226 I.C.C. 201, 209; *Routing Grain and Grain Products via Chicago, R.I. & Pac. Ry.*, 198 I.C.C. 117; *Routing on Iron and Steel Articles*, 168 I.C.C. 175, and *Grain and Grain Products*, 161 I.C.C. 709.

The proposition that the cancellation of a joint rate does not of itself cancel an existing through route is also supported by Section 6(1) of the Interstate Commerce Act, which affirmatively recognizes the existence of through routes in the absence of joint rates. The pertinent part of Section 6(1) provides:

> "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between dif-

ferent points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. *If no joint rate over the through route has been established,* the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separate established rates, fares and charges applied to the through transportation: * * *." (Emphasis supplied)

The emphasized language of the statute would not make sense unless Congress contemplated the existence of through routes in the absence of joint rates.

In the decision of the Colorado court (Colo. R. 279, at page 288) the evidence which the court characterized as "undisputed" as to the existence of through routes was effectively summarized as follows:

"A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small. In 1948, which was selected as a representative year, 37 carload shipments were made on through bills of lading from the northwest area to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific or its connections, but none moved to any destination east of Colorado common points. In the same year, 18 carload shipments were made westbound on through bills of lading from points east and southwest over connecting lines and the Rio Grande to Salt Lake City or Ogden and the

Union Pacific to destinations in the Northwest area. In addition, 21 carload shipments moved on through bills of lading from various eastern points to destinations in the northwest area, which were routed over the Rio Grande and Union Pacific, were held by the Rio Grande at Denver or Pueblo for change of the routing because the joint through rates were not applicable. The traffic movement to and from the northwest area over the Rio Grande through the Ogden gateway on through bills of lading and at through rates was substantially the same in years prior to 1948 and continued into 1949, until the date of the Commission hearings.

"From November, 1942 to August, 1945, a number of shipments were diverted under service orders issued by the Commission from the regularly used routes to the Rio Grande route. During World War II mixed trains of troops in passenger cars and of military supplies in freight cars moved from eastern and southern points on through billing over the Rio Grande via Ogden and Union Pacific to the closed door area. These trains were not routed under service orders issued by the Commission. In 1949, when the main line of the Union Pacific in Wyoming was blocked by snow, the traffic was diverted over the Rio Grande between Denver and junctions with the Union Pacific in Utah. These latter movements were made under emergency conditions and admittedly do not tend to establish an ordinary course of business between the carriers involved, but the Commission did not invoke its authority under §15(4) of the Act to establish temporary through routes which indicates that the Commission assumed that through routes were already in existence."

There is no evidence to the contrary, to-wit: that the

Union Pacific has ever refused to issue a through bill of lading over the Rio Grande when the shipper is willing to pay the price.

V.

Commission's Misconception of the Law of Through Routes

The Commission (five members out of ten) misconceived *Thompson v. United States,* 343 U.S. 549, and erroneously assumed its facts to be similar to those of the Rio Grande case. There are substantial differences between the facts of the Rio Grande case and the facts in the *Thompson* case. In the *Thompson* case the Court said, at page 551, with respect to the existence of a through route from Lenora to Omaha via the Burlington line:

> "But there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line or that the carriers have ever offered through service over that route * * *."

In the instant case there is undisputed evidence of numerous through shipments through the Ogden gateway via the Rio Grande in connection with the Union Pacific (see Statement, *supra* pp. 13-17).

At page 557 of the *Thompson* case, the Court observed:

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service."

What is a "holding out" as announced in the *Thompson* case? In any form of business, it does not require active, affirmative solicitation of business. The merchant who has his shop on any street, with his door open to the public, holds himself out to accept business and thus solicits business. There is a "holding out" whether he receives a large or a small amount of business and whether his prices are higher or lower than a shop up the street. There is a lack of "holding out" only when he refuses to accept business. Under the undisputed evidence in the instant case and under its own admissions, the Union Pacific never refuses to accept through shipments and issue through bills of lading over the Rio Grande where a shipper to or from the "closed door" territory is willing to pay the higher combination rate. As shown by the evidence and as set forth in the decision in the Colorado case, in spite of the higher rates, substantial typical shipments via the Rio Grande on through bills of lading issued by the Union Pacific were made during the years immediately preceding the institution of these proceedings before the Commission (see Statement, *supra* pp. 13-17). This evidence shows that the contention that the through routes are "commercially closed" is pure theory.

The five Commissioners out of the ten who participated in the decision of the Commission and who failed to hold that through routes exist, misconceived the meaning of Section 6(1) of the Interstate Commerce Act, and the *Thompson* case, 343 U.S. 549, and the *Virginian* case, 272 U.S. 658. They also ignored and disregarded the evidence which establishes that a substantial

volume of traffic has been shipped on through bills of lading by shippers, including the Government, via the Rio Grande in connection with the Union Pacific through the Ogden gateway; that another substantial volume of traffic had been handled via the same through routing under service orders of the Commission; and that in 1948 and prior thereto, and continuing to the time of the hearings, through routes have been used under through bills of lading issued to shippers by the Union Pacific and the other defendant railroads (Consol. R., I, 76). The same five Commissioners also ignored and disregarded the legal effect and significance of the admissions made by the Union Pacific principal traffic witness, Mr. Stilling (Consol. R., I, 799, 800), and by Mr. Collins, counsel for the Union Pacific (Consol. R., II, 1621), that through routes exist, as well as the legal effect and significance of the Commission's own service orders utilizing the through routes via R Grande already in existence.

The basic error inherent in the Commission's conclusion (five members) as to the non-existence of through routes is shown by the Commission's statement in its Report (287 I.C.C. 611, 616; Consol. R., II, 1518, 1523) as follows:

> "As above stated and as testified by numerous shippers in this proceeding, the Ogden Gateway routes are not considered as open or through routes *commercially*, but as routes that are closed to shippers *because of the higher rates applicable*. Plainly, a finding that such routes should be opened to shippers on a *commercial basis* by establishing competitive joint rates would result in the establishment of such routes as effective through routes,

a character which they do not now possess." (Emphasis supplied)

The Commission by that statement evidently adopted the position that because through routes are subjected by the Union Pacific to the commercial deterrent of shippers being arbitrarily required to pay higher than the competitive joint rate, they cannot be regarded as through routes within the meaning of the Act. In this the Commission erred. In *St. Louis Southwestern Ry. v. United States,* 245 U.S. 136, and in *Virginian Ry. v. United States,* 272 U.S. 658, this Court rejected as without legal significance the contention of a railroad that routes which are "commercially closed" as a result of higher and discriminatory combination rates are not through routes within the meaning of the Interstate Commerce Act.

The holding in the *Virginian* case that a through route does not cease to exist because *through traffic* over it is commercially restricted by reason of higher combination rates was cited with approval by the Supreme Court in *Thompson v. United States,* 343 U.S. 549. At footnote 18 of the decision in that case, Chief Justice Vinson, in distinguishing the facts in the *Thompson* case from those in the *Virginian* case, said that:

> "*Virginian R. Co. v. United States,* 272 U.S. 658, is inapposite since through routes were there found to be in existence but commercially closed solely because of unreasonable and discriminatory rates charged by the *Virginian* over its portion of the route."

Despite the noncompetitive character of the combina-

tion rates in effect over the routes via the Rio Grande, through traffic has continued to move over such routes as shown by the evidence summarized at pp. 13-17, 57, 58, of this brief. Hence, if the *Thompson* case, as Chief Justice Vinson stated, is inapposite with respect to the *Virginian* case, it is even more inapposite with respect to the Rio Grande case. Therefore, the Commission erred in treating the *Thompson* case as controlling.

It is also a distortion of the *Thompson* case to say, as five members of the Commission did, that the Supreme Court cited *Beaman Elevator Co. v. Chicago & N. W. Ry.*, 155 I.C.C. 313, with approval. The *Thompson* case referred to the *Beaman* case in footnote 13 which stated merely that the Commission held in the *Beaman* case that proof of one shipment—and that apparently in error—on a through bill of lading over a certain route was not sufficient to establish the existence of a through route because one shipment was not representative of the carriers' course of business.

Moreover, in *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.) aff'd *per curiam*, 336 U.S. 933, the court reiterated the doctrine of the *Virginian* case and added at p. 924:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to the destination on the line of another. In determining the existence of a 'through route,' all of the circumstances connected with the shipments from place to place may be taken into account."

Whatever other facts or incidents may serve to prove

the existence of a through route, it is sufficient that "A through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a 'through route.'" *Through Routes and Through Rates,* 12 I.C.C. 163, 167. In that decision the Commission relied upon a passage defining through routes set forth in *Cincinnati, N.O. & T.P. Ry. v. ICC,* 162 U.S. 184. At page 167, referring to a Supreme Court definition of the existence of a through route in the above case, the Commission said:

> "The full significance of this passage" (from the Supreme Court decision in the *Cincinnati* case, *supra*) "appears when it is remembered that it was written in a decision holding that an intrastate common carrier became a part of a through route on traffic as to which it expressly declined to arrange for a joint rate, and to which it applied its local rates. Therefore it is settled that, whatever other facts or incidents of a shipment may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a through route."

In connection with the through traffic moving over the Rio Grande via the Ogden gateway, the majority of the Commission ignored the statutory conditions under which a shipper may select a route. Section 15(8) of the Interstate Commerce Act provides that at the time of the delivery of property to a common carrier railroad for transportation, the shipper may designate in writing the route via which the shipment shall move where "two or more through routes and through rates shall have been established as in this part provided to

which through routes and through rates such carrier is a party * * *." Thus, unless there is a choice of two or more established through routes, a shipper is not permitted by law (Section 15(8)) to select a particular route as a through route. Hence the Union Pacific in permitting shippers in the "closed door" territory (even at a higher rate) to route over its lines and via the Rio Grande through the Ogden gateway on through bills of lading, as the record shows it continuously has consented to do, must under the law be treated as having recognized such a route as an existing through route. This conduct of the Union Pacific constitutes a "holding out" and is a legal recognition of the existence of a through route.

Clearly the Union Pacific's contention that the mere cancellation of joint rates effected a cancellation of through routes is contrary to law, and contrary to its own conduct, and as heretofore stated, contrary to the admissions of its own counsel and of its own principal traffic witness. Its counsel and its principal traffic witness expressly admitted that a shipper who is willing to pay the higher combination rate has the right to specify through routes via the Union Pacific and Rio Grande—which right only exists (Section 15(8)) when such through routes are already in existence.

To support the existence of through routes over the Rio Grande in connection with the Union Pacific, actual movement of traffic on through billing over each and every of the possible routes involved was not required. Typical shipments are sufficient to support the existence of through routes generally. Although four

members of the Commission treated the shipments as typical and sufficient, the majority held in effect that it is necessary to have detailed evidence covering every commodity from every point of origin to every destination via every route, before the Commission can find through routes in existence as alleged in the Rio Grande complaint. In this respect the Commission again erred as a mater of law.

As was cogently stated by Justice Brandeis in *The New England Divisions Case*, 261 U.S. 184, at page 197:

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed 600; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past, and how it had dealt with them."

The quoted statement of the Court is as applicable to the nation-wide scope of the through route issue involved in the Rio Grande case as it was in *The New England Divisions Case*. The observation made in *The New England Divisions Case* is amply supported by the decisions of this Court in *Georgia Pub. Serv. Comm'n v. United States*, 283 U.S. 765, 774; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R.R.*, 257 U.S. 563, 579, and

Illinois Cent. R.R. v. Public Utilities Comm'n, 245 U.S. 493, 507.

The decisions in *Quanah, A. & P. Ry. v. Atchison, T. & S. F. Ry.*, 226 I.C.C. 201, and *Cancellation of Rates and Routes Via Short Lines*, 245 I.C.C. 183, embraced issues and rates and routes that were also nation-wide in scope. In the *Quanah, Acme and Pacific* case the defendants before the Commission were the same as the defendants before the Commission in the Rio Grande case, and in *Cancelation of Rates and Routes Via Short Lines* the same railroads were respondents. Each of these cases involved rates on commodities generally, between practically all points in the United States over more than a hundred routes. In those cases, as here, the defendant railroads contended that the Commission could not make the findings requested by the complainants in the absence of specific evidence which showed in detail that the transportation conditions on each railroad participating in the numerous alleged unduly preferred routes were substantially the same as the conditions on each railroad against which the alleged discrimination operated. In the cases cited, the Commission properly considered the evidence introduced as typical of the traffic and transportation conditions as a whole, and rejected the contentions made by the railroad defendants.

The Union Pacific has tried to belittle the Rio Grande evidence as to the number of shipments on through bills of lading via the Ogden gateway, but the wonder is that there have been so many shipments or instances of through bills of lading where shippers are arbitrarily required to pay a higher price in order to

use the Rio Grande. Since the evidence shows substantial and typical shipments, and there was an absence of any proof to the contrary, it was not necessary to submit further proof on the existence of through routes.

In this connection, it should be kept in mind that Mr. Hogue, Vice-President of the Rio Grande, in testifying with respect to the shipments during the year 1948, said that he used the year 1948 because it was the last calendar year prior to the hearings before the Commission, and that the same situation with respect to shipments existed to about the same extent in prior years and continued to the time of the hearings (Consol. R., I, 76).

Moreover, it is very rare to have the counsel for a litigant and the chief witness of that litigant admit a basic contention in a case, as was done here with respect to the existence of through routes via the Ogden gateway, and then be faced with denial by the litigant of the very proposition admitted.

VI.

The Commission's Misapplication of Section 15(4) Resulted in Its Failure to Give Full Force and Effect to Sections 1(4), 3(4), 15(1) and 15(3) of the Act

The Colorado court in its Final Judgment and Decree annulled and set aside the Commission Order insofar as it denied and withheld relief to the Rio Grande and its interveners. The opinion of the Commission indicates, as the Colorado court pointed out, that in denying and withholding full relief under the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Interstate Commerce

Act, it mistakenly regarded itself as bound by the limitations of Section 15(4) with respect to the establishment of new through routes. Though the Commission made purported findings against the Rio Grande under these sections, it is obvious that its approach to the entire case, including the application of these sections, was colored and distorted by its erroneous conclusion that the stringent limitations of Section 15(4) governed its disposition of the case.

The provisions of these sections may be summarized as follows:

Section 1(4) requires every common carrier to furnish transportation upon reasonable request and establish just and reasonable through rates, fares, charges and classifications.

Section 3(4) imposes upon common carriers the duty, according to their respective powers, to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines"; and the duty not to "discriminate in their rates, fares and charges between connecting lines * * *."

Section 15(1) *inter alia* empowers the Commission on its own initiative or in extension of any pending complaint, when it is of the opinion that any individual or joint rate, fare, charge, classification or other practice by a carrier subject to the Act is "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," to prescribe just and reasonable rates, fares and charges and just, fair and reason-

able classifications and practices to be followed thereafter.

Section 15(3) of the Act authorizes and requires the Commission, "whenever deemed by it to be necessary or desirable in the public interest" to establish through routes and joint rates, fares and charges. The limitations of Section 15(4) apply only to the establishment of new through routes where none already exist. They do not restrict the broad power of the Commission under Section 15(3) to establish, whenever necessary or desirable in the public interest, competitive joint rates over existing through routes. This was expressly held in *United States v. Great Northern Ry.*, 343 U.S. 562, where the Court, speaking of the limitations of Section 15(4), pointed out at page 576 that this section restricted the power of the Commission only "in respect to those joint rates applicable to through routes established by the Commission," and that "the Commission's power to establish joint rates over existing through routes remains unimpaired."

Because in its entire approach to the instant case the Commission considered itself bound by the limitations of Section 15(4), it failed to give full force and effect to its unrestricted powers under Section 15(3) to prescribe competitive joint rates. It is clear from the Report of the Commission itself that the Commission erroneously considered its power under Section 15(3) to establish joint rates, fares and charges as limited by the restrictions of Section 15(4). The Commission stated (Consol. R., II, 1522): "The power to establish through routes *and joint rates* is limited by the provisions of Section 15(4), * * *." (Emphasis supplied)

As pointed out by the Colorado court, the Commission's failure to find through routes colored and distorted its approach to the entire case, including the application of Section 15(3). If through routes are in existence, as claimed by the Rio Grande and as determined by the Colorado court, the Commission is required to approach all the issues, particularly the necessity or desirability in the public interest of establishing competitive joint rates under Section 15(3), free from the limitations of Section 15(4).

The broad language of the Final Judgment and Decree of the Colorado Court must be interpreted as holding that the Commission erred in its interpretation and application of the foregoing sections to the facts in the instant case. Thus the Commission's misconception of the law of through routes clearly prejudiced the outcome of the proceedings before the Commission.

As is the situation in connection with Section 15(3), so also the limitations of Section 15(4) are inapplicable where under the evidence, relief should be granted under Section 3(4). The chief basis for the foregoing proposition with respect to Section 3(4) is the language of Section 15(4) itself, which expressly provides that the limitations on the establishment of through routes set out therein shall not apply to the power of the Commission to grant relief under Section 3. All the limitations on the power of the Commission in Section 15(4) with respect to the establishment of through routes are inapplicable to a Section 3 violation, and hence are not applicable to the granting of relief under Section 3(4).

The following cases support the foregoing proposi-

tion: *United States v. Great Northern Ry.*, 343 U.S. 562, 574, 575; *Great Northern Ry. v. United States*, 81 F.Supp 921, 924 (D.C. Del.) aff'd, 336 U.S. 933; *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, 777; *Virginian Ry. v. United States*, 272 U.S. 658; *General Mills, Inc. v. Great Northern Ry.*, 269 I.C.C. 457, 466, and *Idaho v. Oregon Short Line R.R.*, 157 I.C.C. 501, 505.

With special reference to Section 1(4) and Section 3(4), the policy of the Interstate Commerce Act was clearly stated in *Missouri & Illinois Coal Co. v. Illinois Cent. R.R.*, 22 I.C.C. 39, at page 46, as follows:

> "* * * Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

The aim of the Act and its policy are to bring about a national system of transportation to the end that the commerce of the country may freely move between all points in the United States over available rail routes, at rates that are neither unreasonable nor discriminatory as between shippers and the railroads or as between connecting railroads: *Railroad Comm'n of Wis. v. Chicago, B. & Q. R.R.*, 257 U.S. 563.

The provisions of Section 3(4) require that reasonable, proper, and equal facilities be provided for the operation of connecting lines as well as reasonable rules and regulations with respect thereto. The restrictive and arbitrary rate policy of the Union Pacific and the

other defendant railroads is not in accord with the foregoing general policy of the Act, and directly violates the specific statutory provisions of Section 3(4).

The only answer of the Commission to the applicability of Section 3(4) to the instant case was:

> "There is upon this record, however, no substantial evidence of the transportation conditions over the established routes referred to. The finding of discrimination under section 3(4) of the act must be supported by showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against and over the routes said to be preferred. No such showing has here been made." (Consol. R., II, 1577).

In the first place, the quoted statement by the Commission is broader than the evidence of record warrants. In the second place, once the Rio Grande establishes a *prima facie* case of discrimination, based upon the inequality of rates and routes and practices with respect to the traffic involved, it becomes the duty of the Union Pacific and the other railroad defendants to show, if they can, that the transportation conditions via the Union Pacific and its preferred connections are sufficiently dissimilar to the transportation conditions via the Rio Grande routes through Ogden to excuse the treatment as not unjustly discriminatory.

In *Continental Steel Corp. v. New York, C. & St. L. R.R.*, 256 I.C.C. 167, at page 174, the Commission said aprópos of a similar question:

> "The burden is not on a shipper to show similarity of carrier competition from the alleged prejudiced and preferred points, but it is on defendants to show by satisfactory and convincing

evidence that a sufficient dissimilarity exists to justify the different treatment. Mere assertions that competition exists from the alleged preferred points is not enough."

It is established that while the burden of proof does not shift, the burden of going forward with the evidence does shift to the party in a given case who is in position to furnish the facts. There is a revealing discussion of this question in *Commercial Molasses Corp. v. New York T. Barge Corp.*, 314 U.S. 104, 111. There the Court said in effect that where a breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the facts in issue and to account for the damage or loss which is claimed. In the instant case the Rio Grande alleged that the Union Pacific and the other railroad defendants before the Commission were guilty of breaches of duty in that they violated certain provisions of the Interstate Commerce Act which required them to maintain reasonable through routes and reasonable and non-discriminatory through rates and practices for the operation of such through routes, as well as reasonable, proper, and equal interchange arrangements, and also provides that carriers "* * * shall not discriminate in their rates, fares, and charges between connecting lines * * *."

Moreover, since the Interstate Commerce Act is a remedial statute which should be broadly construed and which imposes affirmative duties upon the railroads and confers authority upon the Commission to enforce such duties, the Commission erred as a major premise in holding that the burden of proof was upon the Rio

Grande to show that the transportation conditions over the alleged preferred railroad connections of the Union Pacific are the same, or substantially the same, as the transportation conditions via the route of the Rio Grande through Ogden. That view is supported by the decisions of the Commission and of the Supreme Court already cited, and by *United States v. Grogg*, 9 F.2d 424 (D.C. W.D. Va.); *Warn v. Davis Oil Co.*, 61 Fed. 631, 632 (D.C. S.D. N.Y.); *The Emma F. Angell*, 217 Fed. 311 (D.C. E.D. Pa.); *Williams v. Casebeer*, 126 Cal. 77; *Baxter v. Camp*, 71 Conn. 245; and other cases cited in Sec. 190, Chamberlayne on Evidence, and 27 Corpus Juris, Sec. 21.

When properly appraised, the evidence in the record before the Commission does show that the transportation conditions on the traffic involved through Ogden via the route of the Rio Grande and its connections are not less favorable than are the transportation conditions via the preferred routes which the Union Pacific maintains with numerous other railroads. On the contrary, there is substantial evidence which demonstrates that the transportation conditions over the routes of the Rio Grande and the Union Pacific through Ogden are just as favorable as the transportation conditions via many of the preferred routes in which the Union Pacific joins other railroads in maintaining competitive joint rates. Moreover, in many instances the distances are shorter in connection with the Rio Grande route through Ogden than are the distances via the Union Pacific's preferred routes. For example, it belies belief that the transportation conditions over the route of the Rio Grande and Union Pacific through Og-

den could be or are any less favorable than the transportation conditions via the Rio Grande where it now participates with the Southern Pacific and the Union Pacific and other railroads at competitive joint rates on traffic that originates or terminates at points in western Washington, which may be routed to Portland via the Union Pacific, thence via the Southern Pacific through Oregon, northern California, Nevada and Utah, to Ogden, thence via the Rio Grande to Denver, Pueblo or other Colorado common points and thence via the Rio Grande's prairie line connections, including the Union Pacific, to destinations such as Kansas City, St. Louis, or Chicago.

It is a known geographical fact that the Rio Grande route traverses a mountainous terrain. The same is true of the Southern Pacific over its lines through Oregon and northern California, and also of the northern transcontinentals in crossing the Rockies in Idaho and Montana, which railroads are preferred connections of the Union Pacific, and as such are accorded through routes and competitive joint rates. The same is also true of the Union Pacific on various portions of its lines.

Commissioner Lee said: "The evidence does not establish that transportation conditions are more favorable over these routes" (the Union Pacific and its connections) "than over the Rio Grande route which is discriminated against by the defendants" (Consol. R., II, 1584).

With respect to the present excellent status of the Rio Grande as an up-to-date railway with modern equipment and efficiently operated in comparison with other railroads throughout the United States, the Com-

mission entirely overlooked the significance of the testimony of Mr. Wilson McCarthy, President of the Rio Grande. Mr. McCarthy testified that within recent years the Rio Grande had become financially sound and is today an efficient, modern railway system. He said (Consol. R., I, 42 *et seq.*):

"The capital structure has been revamped so that annual fixed charges on our mortgage obligations, which in 1935 amounted to $5,073,390, are now only $1,314,077.

"The physical plant has been improved to the point where greater economy and expeditious operation is now possible. Since my coming to the property approximately 109 million dollars have been expended in improving the company's property and facilities.

"When I came to the property, 70 per cent of our standard gauge freight equipment was over twenty years old. Today only 40 per cent of this equipment is over that age. Proportionately even greater gains have been made in our freight and passenger schedules.

"In 1935 our locomotives had an average tractive effort of only 49,574 pounds. Today the average tractive effort is 70,638 pounds—a gain of over 42 per cent.

"The Rio Grande has moved rapidly toward dieselization and I believe today owns proportionately more of this type of equipment than any other western Class I railroad. Today over 70 per cent of our freight traffic is handled by diesel power. This compares with an average of 32 per cent for all Class I railroads.

"During the same period since 1935, the Company's main line was virtually rebuilt. Four hun-

dred and seventy-four bridges have been built or rebuilt, 531 repaired and some 215 eliminated. A total of 1,457 miles of rail have been laid—843 miles with new rail. Almost four million cross ties have been replaced with treated ties and heavy slag ballast has been applied to 634 miles of track.

"The capacity of our company's main line has been further increased through the construction of a second tunnel through the Continental Divide at Tennessee Pass, the installation of some 507 miles of Centralized Traffic Control and 186 additional miles of Automatic Block Signals, the building of more and longer passing tracks, and the reduction of grades and curvatures.

"Safety and economy have been promoted through the construction of slide detector fences, widening of cuts, installation of track and flange oilers, purchase of off-track work equipment and the providing of a greatly improved communications system. The Rio Grande was the first U. S. Railroad to receive a regular license to install and operate radio communication equipment on its trains.

"Similar improvements have been made in the company's yard and terminal facilities with the view to expediting service and reducing costs. These have included extensive track changes, the construction of modern yard offices, the flood-lighting of yards, and the installation of pneumatic tube, radio and loud-speaker communication systems. Service and schedules have likewise benefited from an extensive motive power modernization program.

"Our research laboratory is known throughout the world and many of its discoveries have added to the safety and economy of rail transportation.

"The effect of all this on the company's operating efficiency is evidenced in the fact that the Rio Grande has shown proportionately greater gains in recent years than either Class I or Western District Carriers as a group in the number of gross ton-miles it has produced per train hour operated. The record shows, moreover, that, notwithstanding the mountainous terrain, the company's freight trains in 1948 actually operated at higher average speeds than most lines.

"Because of the improved physical conditions, and for other reasons that will be covered in the testimony for the complainant, the management of the complainant reached the conclusion that there is no justification for the failure and refusal of the defendants, including the Union Pacific, to maintain joint competitive rates via the route of the Rio Grande through the Ogden Gateway; and, as a result of these considerations and conclusions, the complaint was filed with the Interstate Commerce Commission on August 1, 1949."

There is no evidence in the record contradicting the foregoing testimony as to the favorable transportation conditions and the efficiency of operation of the Rio Grande as compared with the other Class I railroads of the country or Western District Carriers as a group.

The statutes impose on railroads an affirmative duty to interchange and forward traffic between connecting lines without discrimination in their rates and charges. This principle was announced very early by the Commission and has never been varied. In *Western Pacific R. R. v. Southern Pacific Co.*, 55 I.C.C. 71, at p. 80, the Commission in referring to Section 3(2), which later became Section 3(4), said:

"There is no escape from the plain intent of these enactments. Reasonable, proper and equal facilities must be afforded for the affirmative duty, and there must be no partiality or injustice in the terms and conditions upon which the duty is performed—in other words, no discrimination in rates and charges. All parts of this provision are of equal authority and obligation. They are the mandate of the same source of power, and it must be assumed that they are intended to have full and complete effect. * * * "

As stated by Chairman Cooley in *New York & No. Ry. v. New York & N. E. R. R.*, 3 I.C.C. 542, 550, Section 3(4) "can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the Statute it is only a meaningless enactment. * * * "

The only excuse appearing in the record for the unjust discrimination above referred to, forbidden by Section 3(4) of the Interstate Commerce Act, was offered by the principal traffic witness for the Union Pacific, Mr. Stilling, who undertook to justify participation by the Union Pacific with the Southern Pacific, the Great Northern, the Northern Pacific, the Milwaukee and the Spokane International and their other preferred connections on the grounds:

(1) That the arrangements have been in effect over a long period of time (Consol. R., I, 816); and

(2) That the arrangements are mutually beneficial

in the sense that the railroads participating in the routes share in long hauls and short hauls with each other (Consol. R., I, 816, 817).

But the fact that the arrangements have been established for a long time and that they are mutually satisfactory to the participants in no manner excuses the discrimination and the violation of the statutes involved. In *Pennsylvania Co. v. United States*, 236 U.S. 351, where the validity of an order of the Commission was assailed, the defendants before the Commission contended that there was no unjust discrimination because of the lack of similar reciprocal interchange arrangements with the complaining railroad. In dealing with this question, the Supreme Court said, at p. 365:

> "We agree with the Commission and the court below that the alleged reciprocal shipping arrangements do not remove the discriminatory character of the treatment of the Rochester road."

The decision of the Supreme Court in *Chicago, I. & L. Ry. v. United States*, 270 U.S. 287, is to the same effect and deals with a situation substantially similar to the contentions made by the Union Pacific's witness Mr. Stilling.

The discrimination in this connection on the part of the Union Pacific and the other defendant railroads is obvious. Section 3(4) was designed to reach and terminate such discriminatory and unreasonably prejudicial practices as the Union Pacific and its favored connections are now imposing with respect to the movement of railroad traffic in and to the vast growing and

developing area consisting of large parts of five great western states.

We now turn to a consideration of Section 1(4) in its relationship to the Colorado decision. This section requires every common carrier to furnish transportation on reasonable request and with other carriers to prescribe just and reasonable through rates, fares, charges and classifications.

The limitations with respect to the establishment of through routes set forth in Section 15(4) were not intended as a restriction upon the duty of a railroad company to establish reasonable rates. Under Section 1(4), a railroad company has a duty to establish reasonable rates, and under Sections 15(1) and 15(3), the Commission has the power, after a hearing in an appropriate proceeding, to prescribe just and reasonable single or joint rates when the rates under investigation are unjust and unreasonable, or unduly prejudicial and unjustly discriminatory. The broad and unrestricted power of the Commission to pass upon the reasonableness of rates is well set forth in *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, at page 776, as follows (opinion by Justice Brandeis):

> "The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, §4, 34 Stat. 584. There is not, in that act as amended (see *United States v. American Ry. Express Co.*, 265 U.S. 425, 430, 44 S.Ct.

> 560, 68 L.Ed. 1087, note 2), or in any decision of this court construing it, or in any of the decisions of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. Compare *Nashville, Chattanooga & St. Louis Ry. Co. v. Tennessee*, 262 U.S. 318, 323."

Moreover, in *Great Northern Ry. v. United States*, 336 U.S. 933, this Court affirmed a decision of the United States District Court for the District of Delaware (81 F.Supp. 921), which in turn had affirmed a Commission decision (269 I.C.C. 457), holding that the Commission was not required to establish through routes under Sections 15(3) and 15(4), in order to find that combination rates were unlawful under Sections 1 and 3 of the Interstate Commerce Act. To the same effect is *New York v. United States*, 331 U.S. 284.

The facts referred to *supra* pp. 17-20, and *infra* pp. 107-110, with respect to prejudice and discrimination under Section 3(4) are equally applicable here to establish under Section 1(4) that the rates and practices of the Union Pacific and its preferred connections are unjust and unreasonable.

In the Rio Grande case, the Commission acted on the theory that in order to grant any relief whatever it was under the necessity of establishing new through routes under Section 15(4). The Colorado court was fully justified in stating that this erroneous self-imposed restriction upon the Commission's authority to estab-

lish reasonable or joint rates obviously prejudiced and distorted its approach to the entire case and improperly caused it to treat itself, in denying relief to the Rio Grande under Sections 1(4), 3(4), 15(1) and 15(3), as somehow restricted by the limitations of Section 15(4). Therefore the Colorado court in its Final Judgment and Decree (Colo. R. 361) properly remanded the entire cause to the Commission, in so far as the Commission denied and withheld relief to the Rio Grande and the intervening plaintiffs, for further proceedings "in conformity with the opinion and judgment" of the Colorado court.

VII.

The Errors of the Commission Require an Affirmance of the Colorado Decision

By way of summary, it is submitted that the Colorado court was correct in holding that the Interstate Commerce Commission erred in the following particulars:

(1) In failing to hold, under the undisputed evidence, that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and

(2) In narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, since that section does not apply where: (a) through routes are in existence, or (b) where under the evidence of the case, and as a matter of law, relief as to reasonable rates or joint rates should be granted under a proper application of Sections 1(4), 3(4), 15(1) and 15(3) of the Act.

A remand of the case with proper directions, as ordered by the Colorado court, is the appropriate procedure for enabling the Commission to correct its errors.

NEBRASKA DECISION

I.

Outline of Issues

As pointed out in connection with the appeal from the Colorado court, the Comission, by erroneously proceeding on the theory that through routes via the Rio Grande through the Ogden gateway in connection with the Union Pacific do not exist, granted only limited relief to the Rio Grande and to the intervening plaintiffs. The Commission limited the relief to prescribing competitive joint rates and through routes as to certain named commodities. It further imposed a territorial limitation which made the relief applicable on the named commodities via the Ogden gateway over the Rio Grande from points on the Union Pacific and its connections in Washington, Oregon, Idaho, Montana and northern Utah only to points south and east of a designated area which extends northerly and to some extent southerly from Colorado common points such as Denver, Pueblo and Trinidad (see Map, App. E hereto).

In terms the Commission order of January 12, 1953 requires the Union Pacific Railroad Company and the more than 200 other railroad defendants before the Commission to cease and desist from publishing, demanding or collecting transportation charges on cer-

tain commodities which exceed the rates and charges prescribed by the Commission from and to the points named and from practicing the undue prejudice, preference and unlawful discrimination referred to in the order (Consol. R., II, 1595-1597).

The Commission's Report, containing its findings of fact and conclusions, is expressly made a part of its Order and the two must be read together. *Georgia Pub. Serv. Comm'n v. United States,* 283 U.S. 765, 771. The conclusions are set forth in this brief at pages 29-31, but for convenience, are summarized as follows:

> The Commission concluded under Sections 15(3) and 15(4) of the Interstate Commerce Act that competitive joint rates and through routes on the traffic covered by its order are necessary and desirable in the public interest to provide adequate and more economic transportation; and under Sections 1 and 3 that the existing rates and charges on the said traffic are and for the future will be unjust and unreasonable and unduly prejudicial to shippers and receivers using or desiring to use the routes of the Rio Grande, and unduly preferential for shippers and receivers using the routes of the Union Pacific and other defendants. The Commission also found that maintenance by the Union Pacific and other railroad defendants of joint rates between the northwest area described, on the one hand, and points on the Bamberger Railroad between Salt Lake City and Ogden, Utah, on the other hand, while refusing to maintain like rates to and from the same points on the line of the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Section 3(4) of the Interstate Commerce Act.

The Nebraska court sustained the Order of the Commission in part, and over-ruled it in part by restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande, to be accorded in-transit privileges at such points, and to be later shipped to points beyond the Rio Grande (Neb. R. 167).

The basic issues involved in the Nebraska case (which may not be reached if the Colorado decision is affirmed by this Court) are:

1. Whether the Nebraska court erroneously substituted its judgment for the judgment of the Commission with respect to the administrative findings made by the Commission under which the Rio Grande was granted relief (see Questions Presented 1-6, *supra* pp. 4-6).

2. Whether the Nebraska court erred in interpreting and applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) prohibiting any carrier from giving undue preference to any person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, does not apply where the persons and localities affected by the preference or prejudice are located on different railroad lines and where, as in this case, the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the preference and prejudice complained of (see Questions Presented 1-6, *supra* pp. 4-6).

II.

The Nebraska Court Erred in Overruling Findings of the Commission Which Were Administrative in Character and Supported by Substantial Evidence

In exercising its recognized administrative functions, the Commission is operating in an area over which it has been given exclusive jurisdiction by Congress for the purpose of assuring a coordinated and efficient national transportation system and establishing just, reasonable and non-discriminatory railroad rates. *Dayton-Goose Creek Ry. v. United States,* 263 U.S. 456, 478; *The New England Divisions Case,* 261 U.S. 184; and *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. R.,* 257 U.S. 563.

While in exercising its delegated powers the Commission does not have freedom of ownership and operates in an area limited by constitutional rights and legislative requirements, the Supreme Court has frequently said that the outlook of the Commission and its powers must be greater than the interest of particular carriers and must in fact be as comprehensive as the interest of the whole country, and that only questions of law including those affecting constitutional power, statutory authority and basic prerequisites of proof can be raised against an order of the Commission. *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 140, 145, 146; *Atchison, T. & S.F. Ry. v. United States,* 284 U.S. 248, 262; *O'Keefe v. United States,* 240 U.S. 294, 303; *ICC v. Union Pacific R.R.,* 222 U.S. 541, 547; *ICC v. Chicago, R.I. & Pac. Ry.,* 218 U.S. 88, and *ICC v. Illinois Cent. R. R.,* 215 U.S. 452.

In modifying the Commission's findings in the instant case, the Nebraska court entered the field allocated to the exclusive jurisdiction of the Commission, erroneously substituted its judgment with respect to the weight and significance of certain facts for the judgment of the Commission and in doing so ordered different and narrower relief than the relief prescribed by the Commission. (Questions Presented 1-6, *supra*, pp. 4-6).

Since the subjects dealt with in paragraphs 1 to 6, inclusive, of the Questions Presented in the Nebraska case are interrelated and are concerned with interrelated findings and ultimate conclusions of the court below, they will be discussed collectively.

As we have already indicated, the Commission prescribed competitive joint rates and through routes on granite and marble monuments in carloads from origins in Vermont and Georgia to destinations in the "closed door" territory, and on a limited number of commodities eastbound from the "closed door" territory via the route of the Union Pacific through Ogden or Salt Lake City and via the Rio Grande to destinations south and east of a designated area which extends northerly and to some extent southerly from Colorado common points (see Map, App. E hereto), without the imposition of any conditions with respect to the stopping of the freight at points in transit for loading, unloading, cleaning, milling, storing, fabrication, etc.

Because the testimony of various shippers and producers before the Commission (see App. F hereto) emphasized the importance and the necessity of in-

transit arrangements, which are maintained by the Rio Grande and railroads generally throughout the country, as an aid to producers and shippers in the preparation and the processing of commodities for marketing, the court below erroneously assumed that the primary need was for in-transit privileges at points on the Rio Grande, whereas in fact the primary need is for competitive joint rates via the Rio Grande so that its route can be used and cars stopped at points on the Rio Grande or at points on other railroads east of the Rio Grande.

In-transit privileges are generally provided by the Rio Grande in its published tariffs (Consol. R., I, 114; Earley Exhibit 3, Sec. H, pp. 1-6). The privilege of stopping through freight in-transit at points on the Rio Grande or on its eastern connections is, as stated, already provided for in the tariffs of the Rio Grande and other railroads. In the circumstances, the Commission was not called upon to require the defendant railroads to establish the privilege of stopping freight for various in-transit privileges at points on the Rio Grande or at points on the Union Pacific or on such railroads as the Missouri Pacific, the Rock Island, the Burlington, the Santa Fe and other railroads with which the Rio Grande connects at Colorado common points. The Commission correctly understood that such in-transit privileges are commercially ineffective unless the freight which is accorded in-transit privileges may move from the original points of shipment to ultimate destinations at competitive joint rates.

In paragraph I of the Conclusions of Law in the opinion of the Nebraska court (Neb. R. 167), that court held that the evidence supports the finding of the Commission that the establishment of competitive joint rates and through routes between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the commodities involved originating in the "closed door" territory, only if—

> "consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities, the order of the Commission is valid under Sections 1, 15(3) and 15(4) of the Act and does not violate the direction of Section 15(4) that reasonable preferences be given the carrier which originates the traffic."

On the other hand, in paragraph III of its Conclusions of Law (Neb. R. 167, 168), the Nebraska court held that:

> "To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15(4) constitutes a limitation on the

power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide *inter alia,* adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking."

In the last conclusion quoted, the court said in effect that to the extent that the Order of the Commission requires the establishment of competitive joint rates and through routes via the Union Pacific and the Rio Grande on carload traffic from the "closed door" territory to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such a nature as not to require in-transit privileges, and as to all traffic moving from the "closed door" territory to points of original destination east of Denver, Pueblo and Trinidad, the Order is invalid because Section 15(4) constitutes a limitation on the power of the Commission to establish through routes which will result in short-hauling the Union Pacific unless such routes are necessary in order to provide, *inter alia,* adequate transportation.

In that conclusion the court ignored the fact that the Commission not only found that the competitive joint rates and through routes prescribed are "necessary and desirable in the public interest; in order to provide adequate and more economic transportation," but

that the rates assailed by the Rio Grande are and for the future will be unjust and unreasonable, and "unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes."

The conclusion of the Nebraska court results in the anomaly that lower joint rates are made available on in-transit shipments, stopped on the Rio Grande and then reconsigned, than will be available on through shipments that do not require the services or the expense connected with in-transit privileges.

The authority of the Commission to compel railroads to establish just, reasonable and non-prejudicial individual or joint rates or charges is conferred in Section 15(1) of the Act. The standard for action in that section is that the existing rates or charges are unjust, unreasonable, unduly prejudicial, etc.

Paragraph (3) of Section 15 authorizes the Commission "whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint * * * " to establish through routes and joint rates, fares or charges, etc., as well as the terms and conditions under which such through routes shall be operated. The standard for action under Section 15(3) is that the joint rates or through routes are necessary or desirable in the public interest.

Paragraph (4) of Section 15 provides that,

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: Provided, however, that in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic.* * * "

The limitations in Section 15(4) of the Interstate Commerce Act on the power of the Commission to require the establishment of through routes are exceptions to the general policy and objectives of the Interstate Commerce Act, and should be strictly construed, whereas the affirmative remedial provisions of the Act should be liberally construed. *Piedmont & No. Ry. v. ICC*, 286 U.S. 299, 311, 312 and *Spokane & I.E. R.R. v. United States*, 241 U.S. 344.

In *Routing via Quanah, A. & P. Ry.*, 220 I .C.

137, 139, sustained in *Thompson v. United States*, 20 F.Supp. 827 (D.C. E.D. Mo.), the Commission said that the provisions of Sections 15(3) and (4) with respect to through routes and joint rates do not stand alone and that "They must be considered in the light of other provisions of the Act, including Sections 1 and 3." In the recent decision of the Commission in *Borough of Edgewater, N. J. v. Arcade & A. R. Corp.*, 280 I.C.C. 121, 123, sustained in *Baltimore & O. R.R. v. United States*, 100 F.Supp. 1002 (D.C. S.D. N.Y.), the Commission stated this proposition more pointedly:

> "The provisions of section 15(4) quoted above, which recognize the right of a carrier to its long haul, are, as indicated, subordinate to the provisions of section 3 of the act, by which, among other things, any undue or unreasonable prejudice or disadvantage is prohibited."

In the same decision, 280 I.C.C. 121, at page 134, the Commission made the following significant statement as to the present policy of the Interstate Commerce Act:

> "Ever since the Transportation Act, 1920, it has been the purpose or policy of Congress that rates be adjusted and other steps taken to ensure adequate, efficient, and economical transportation for the country. That policy has never been regarded as intending that we should accept as the guide transportation service which is just barely adequate, or adequate only if needed or desirable improvements in service are lost sight of. See *McLean Trucking Co. v. United States*, 321 U.S. 67, 78, 81. Rather, that policy seeks affirmatively to build up a transportation system prepared to handle promptly all the traffic of the country.

Dayton-Goose Creek Ry. Co. v. United States; 263 U.S. 456, 478."

In short, the aim of the Interstate Commerce Act and its policy is to bring about a national transportation system, to the end that the commerce of the country may freely move between all points in the United States over available rail routes at rates that are neither unreasonable nor discriminatory as between shippers and railroads, or as between railroads. *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R.R.,* 257 U.S. 563, and *The New England Divisions Case,* 216 U.S. 184.

The Commission was properly influenced by the testimony before it (see App. F hereto) which showed a widespread demand for the use of existing in-transit privileges at competitive joint rates, and it understood what the court below apparently did not understand, namely, that shippers and producers needed competitive joint rates via the Rio Grande and its connections on the traffic involved for general marketing purposes and not solely for in-transit purposes. The court not only erroneously applied the limitations in Section 15(4) of the Act on the power of the Commission to prescribe through routes, but too narrowly construed the exceptions in Section 15(4) which exclude the limitations.

Moreover, the court, in weighing the evidence and in considering the needs of shippers and the public interest, substituted its judgment for the judgment of the Commission and reached the erroneous conclusion that the competitive joint rates prescribed by the Commission are justified and necessary *only* as to traffic origi-

nally consigned to points on the Rio Grande, requiring in-transit privileges at such points, and later to be reshipped to points east and south of Denver, Pueblo and Trinidad and east and south of Kansas City, Mo., and certain other Missouri River points. In other words, the court below went beyond what the Supreme Court has repeatedly stated are the limited functions of courts in reviewing orders of the Commission. In *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 593, the Supreme Court reiterated its views on this subject as follows:

> "We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it."

The lower court also erroneously assumed that the joint rates prescribed by the Commission were needed only by shippers located on the rails of the Rio Grande. Most of the shippers who testified before the Commission are located at points in northern Utah, in Idaho, in Oregon and Washington served by the Union Pacific. A summary of the testimony of various shippers and producers of the commodities involved in the order of the Commission is set forth in Appendix F attached hereto. The testimony of these shippers establishes beyond question the need for the competitive joint rates and through routes prescribed by the Commission.

Generally speaking, the commodities covered by the order of the Commission produced in and shipped from the "closed door" territory are marketed at various

points throughout the United States. In numerous instances the ultimate purchaser of the commodity may not be known at the time the shipment starts "rolling" from the origin points. The shippers want to be in position to use whatever rail route best suits their purpose at a given time in the light of weather, market and other conditions, and some of the shipments are stopped several times in transit for partial loading or unloading before the shipment reaches its final destination.

Under the existing rate restrictions imposed by the Union Pacific and its preferred connections, shippers in northern Utah, Idaho, Montana, Washington and Oregon do not have an opportunity of making a selection of routes enabling them more profitably to market their products, and in some cases to "feel out" the markets at such points as Grand Junction, Pueblo, Colorado Springs and other points in Colorado and Utah served by the Rio Grande via Ogden or Salt Lake City. As already stated, the Order of the Commission prescribes joint rates via the Union Pacific, Ogden and the Rio Grande which if established would permit shippers of the commodities involved located on the Union Pacific in the "closed door" territory, as well as shippers, feeders, brokers and others located on the Rio Grande and on its eastern connections, to use the route of the Rio Grande without being penalized by the higher combination rates if the shipments were reconsigned to points beyond the Rio Grande.

Under the judgment of the Nebraska court a shipper in the "closed door" territory cannot obtain the bene-

fit of the competitive joint rates prescribed by the Commission unless the shipment is originally consigned to points on the Rio Grande, at which points it requires in-transit privileges, and then is reconsigned to points specified in the Commission order. In-transit privileges are important, but as the Commission recognized they are not needed on every shipment that might be routed via the Rio Grande under the rates and routes prescribed by the Commission. The fact that a shipper does not exercise his right to in-transit privileges should not warrant subjecting him to the penalty of a higher rate.

The Nebraska court has given the phrase "adequate and more efficient or more economic transportation" as used in clause (b) of Section 15(4) a narrow and unjustified interpretation with respect to the facts of this case. The Commission repeatedly has held that the public interest is not served by shutting out markets from shippers by the denial of joint rates and through routes which do not require the performance of substantially greater total service than the service over existing routes. *D. A. Stickell & Sons, Inc. v. Alton R.R.*, 255 I.C.C. 333, sustained in *Pennsylvania R.R. v. United States*, 54 F.Supp. 381 (D.C.-Md.) which decision in turn was affirmed by the Supreme Court in a case of the same title in 323 U.S. 588.

These decisions hold that the phrase "adequate, and more efficient or more economic, transportation" includes the interest and welfare of the shipper, as well as of the carrier, and that in these circumstances the Commission has authority to consider and weigh the

relative importance of all factors affecting both the shipper and the carrier. In exercising its administrative function in this area the Commission must be sustained when its action is supported by substantial evidence (see App. F hereto). The Nebraska court appears to have been primarily concerned with a comparison of the physical operating conditions of the Union Pacific and the Rio Grande, rather than with the needs of shippers under the complex market conditions that exist and with their right to use various railroads at competitive joint rates as the circumstances may require.

In this connection it should be pointed out that the word "adequate" and the words "more efficient or more economic, transportation" in Section 15(4) were not intended to be restricted to a comparison between two particular railroads, to-wit the Union Pacific and the Rio Grande. Moreover, the words of the statute are intended to be considered from the point of view of the shippers and the general public, at least as much as from the point of view of the carriers.

Nor are the words restricted to a consideration of the physical adequacy, the mechanical efficiency or the economical operation of one railroad as compared to another. Neither the dictionary nor the law defines "economic" as meaning "economical." It is not a question of cheapness of operation of one railroad as compared to another, but more a question of whether the transportation would be better for the economy of the area involved and the country as a whole.

Effective support for the foregoing propositions is

found in *Pennsylvania R.R. v. United States,* 323 U.S. 588, where the Supreme Court, in a detailed opinion, approved the thorough analysis of the language "adequate, and more efficient or more economic, transportation" by the court below, 54 F.Supp. 381, 388-390 (D.C. Md.), which in turn had approved the Commission's views of the same case, *D. A. Stickell & Sons, Inc. v. Alton R.R.,* 255 I.C.C. 333, 339-344. Other cases sustaining a broad meaning for the language are *Baltimore & O. R.R. v. United States,* 100 F.Supp. 1002, 1011 (D.C. S.D. N.Y.); *Helix Milling Co. v. Great Northern Ry.,* 287 I.C.C. 77, 86, 87; and *General Mills, Inc. v. Great Northern Ry.,* 269 I.C.C. 457, 465.

The questions to be answered in applying Section 15(4) are: Is the kind of transportation offered to the shippers to and from the "closed door" territory and to shippers to and from points in the area designated in the Commission order, as adequate as it would be if through routes and competitive joint rates were in operation over the Rio Grande through the Ogden gateway? Is it more efficient for the economy of the "closed door" territory and the economy outside the "closed door" territory to have a choice of routes, than to be confined to one route or required to pay a higher rate over one route when two alternative routes could be made available at the same rate; and would the economy of the "closed door" territory and the economy of the country as a whole be afforded "more economic transportation" if through routes and competitive joint rates were available via the Ogden gateway?

The Nebraska court erred in adopting a narrow and

erroneous interpretation of the language "adequate, and more efficient or more economic, transportation" found in Section 15(4) of the Interstate Commerce Act, and thereby erroneously reduced the measure of relief granted by the Commission.

III.

The Nebraska Court Erred in Interpreting and Applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) and its Implementing Section 15(1) were Inapplicable to the Facts in the Instant Case

Section 3(1) of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of this part—

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * * "

One aspect of the caprice practiced by the Union Pacific in the exercise of its monopoly is illustrated by the fact that the Union Pacific between points in southern Utah, Nevada and southern California on its Los Angeles line, on the one hand, and Colorado common points

and points east thereof, on the other, participates in competitive joint rates and through routes in connection with the Rio Grande via Provo or Salt Lake City, Utah. In other words, from or to points on the Los Angeles and Salt Lake line in southern California, southern Nevada and southern Utah, the Union Pacific accords its shippers the right of selecting their own route as between the Union Pacific and the Rio Grande and of routing their freight at equal rates over the Rio Grande if they so elect (Consol. R., I, 91, 92).

Such position is in striking contrast to the arbitrary and monopolistic attitude adopted by the Union Pacific with respect to traffic from or to points in the "closed door" territory where it withholds from its shippers the right of selection of routes and of routing over the Rio Grande through Ogden or Salt Lake City at equal rates. The Union Pacific, therefore, from or to points in the "closed door" territory not only assumes the right to discriminate against the Rio Grande but also the right to discriminate against shippers in that area, resulting in undue prejudice to such shippers. Certainly, the shippers on the Union Pacific in the "closed door" territory are entitled to the same freedom in the choice of their routes and of routing over the Rio Grande at equal rates, if they so choose, as the shippers on the Los Angeles line of the Union Pacific.

The Commission also appears to have found undue prejudice and discrimination by the Union Pacific and its preferred connections against the territory served by the Rio Grande, as compared with the territory served

by the Union Pacific between Ogden on the west and Denver on the east, in violation of Section 3(1) of the Act. It is well known, and was found by the Commission, that effective participation in the national transportation system is required for the proper economic growth of any region or territory. To the extent that shipments via the Rio Grande are prevented by the rate differentials maintained by the Union Pacific, the economic growth of the territory and region along the Union Pacific lines is promoted at the expense of the territory and region along the Rio Grande. Since the rate differentials are unjustified by transportation conditions, the Commission properly found them to be violations of Section 3(1). The Nebraska court erred in holding that such a finding was not in accordance with law.

In dealing with the finding by the Commission that intervening shippers suffer undue prejudice and undue and unreasonable preference prohibited by Section 3(1), the Nebraska court misconceived the facts on which the Commission acted, as well as the scope of Section 3(1), and of the issues before the Commission for decision. The court below said *apropos* of the finding by the Commission in respect to Section 3(1):

> "If the prejudice and preference shown by the evidence falls within the prohibition of Section 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered. But the prejudice and preference prohibited by Sec. 3(1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3(1) which are served by the one carrier or the combination

acting as one. The prohibition of Sec. 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in *Central R. Co. of New Jersey v. United States,* 257 U.S. 247, was different, the purpose of Sec. 3(1) was there stated as follows: (loc. cit. 259-260) 'What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c.91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of Section 3.'"

The Nebraska court not only failed to appreciate the legal significance of the facts on which the Commission relied in finding that the rates assailed by the Rio Grande subjected the intervening shippers to undue prejudice and undue preference, but misconceived and misapplied the decision of the Supreme Court in *Central R.R. of N.J. v. United States,* 257 U.S. 247. This is illustrated by the above statement of the court below that the prohibitions against undue prejudice and preference of Section 3(1) of the Act do not apply to a situation "such as this where the comparison of preferences and advantages or prejudices and disadvan-

tages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion."

That is the nub of the error of the Nebraska court. It failed to grasp that while the Union Pacific is the principal defendant in the complaint before the Commission, there were more than 200 other railroad defendants who participated with the Union Pacific in the maintenance of competitive joint rates and through routes in connection with the traffic and between the areas involved and that these defendants acted in concert and in collusion with each other and are therefore in *pari delicto* as to the violations of Section 3(1) which the Commission found to exist. In other words, the wrongs which the Rio Grande and the intervening complaining shippers sought the power of the Commission to correct could not exist unless the defendant railroads and the Union Pacific joined in establishing and maintaining competitive joint rates and through routes with each other, while refusing to include the Rio Grande in such rates and routes.

Moreover, the Union Pacific and its preferred connections not only joined in maintaining the undue prejudice and undue preference against shippers found to exist by the Commission, but in numerous instances neither the Union Pacific nor its preferred connections, in joining in such practices, insist as against each other that each railroad always obtain its long haul. In other words, the other railroad defendants participate with the Union Pacific in maintaining the unjust competitive joint rates via various junction points with

each other, regardless of their respective long hauls, but refuse to maintain similar competitive joint rates in connection with the traffic from and to the "closed door" territory via Ogden or Salt Lake City over the Rio Grande.

A few examples (Consol. R., II, 1636 *et seq.*) will be sufficient to illustrate the above point.

Between Seattle, Wash., and Chicago, Ill., via the Union Pacific, to Council Bluffs, and thence via the Chicago and North Western, the distance is 2,439 miles and the haul of the Union Pacific is 1,954 miles. However, the Union Pacific participates in joint rates through Portland with the Southern Pacific on traffic moving through Oregon, California, Arizona and New Mexico, thence Rock Island to Chicago, where the total distance is 3,541 miles. In that movement, the Union Pacific receives a haul of 184 miles. If the Union Pacific is required to establish the rates sought with the Rio Grande through Ogden, it would receive a haul from Seattle to Ogden of 1,027 miles out of a total distance of 2,651 miles, instead of 184 miles between Seattle and Portland as it does when the traffic moves either via the Southern Pacific from Portland through Oregon, California, Arizona and New Mexico or via the Southern Pacific to Ogden, thence via the Rio Grande to Denver or Pueblo, and via the Burlington or any of the so-called prairie lines, including the Union Pacific.

Between Pendleton, Ore., and St. Louis, Mo., the long haul of the Union Pacific is from Pendleton to Kansas City, a distance of 1,674 miles. The Union

Pacific participates in joint rates on transcontinental traffic between Pendleton and St. Louis via the route through Spokane composed of the Spokane International, Canadian Pacific and Soo Line to Minneapolis and the Rock Island and the Wabash to St. Louis. The distance via this route is 2,317 miles, and the haul of the Union Pacific is 227 miles. If the competitive joint rates sought via Ogden were established via the Rio Grande to Denver, the Rock Island and the Wabash to St. Louis, the distance would be 2,149 miles and the Union Pacific haul would be 633 miles.

Between Pendleton, Ore., and Oklahoma City, Okla., the long haul of the Union Pacific would be via Kansas City. However, it participates in competitive joint rates with the Santa Fe through Denver via which route its haul is 1,144 miles, and it participates with the Northern Pacific through Wallula, Wash., and various connections through Kansas City in which the total haul is 2,602 miles, and the haul of the Union Pacific is only 70 miles. If the competitive joint rates sought via Ogden and the Rio Grande and its connections were established, the haul of the Union Pacific would be 633 miles, and the total distance via available routes would be 1,910 miles. The Union Pacific also participates in competitive joint rates between Pendleton and Oklahoma City via the Great Northern through Spokane and eastern connections in which the haul of the Union Pacific is 227 miles.

Between Colfax, Wash., and Chicago, Ill., the long haul of the Union Pacific is 1,756 miles through Council Bluffs, Iowa. But the Union Pacific participates with

the Milwaukee Railroad via Plummer, Ida., in which the haul of the Union Pacific is 54 miles and the total distance 1,888 miles. If the competitive joint rates sought through Ogden and the Rio Grande were established, the haul of the Union Pacific to Ogden would be 829 miles.

In addition to the examples referred to above, Appendix G shows numerous other situations in which the Union Pacific participates with other defendants in taking less than their respective long hauls in connection with particular traffic. On lumber moving from points on the Union Pacific and its connections in Idaho, Washington and Oregon, etc., to points east of Colorado common points, the Union Pacific participates in joint rates and routes with other railroads through Denver and Cheyenne in which it takes less than its long haul. It refuses to accord like treatment to the Rio Grande at Ogden. On the eastbound movement of fruits, vegetables, grain and certain other commodities from Idaho, Washington and Oregon, etc., the Union Pacific participates with other railroads in joint rates and routes which apply via Denver to destinations in Missouri River territory and the southwest. The long haul of the Union Pacific to most of the destination territory just mentioned would be the entire distance to some of the points, or to junctions on its line in Kansas or Nebraska.

The language of Section 3(1) and the numerous decisions of the Commission and of this Court make it clear that there is a sufficient basis in law and in the evidence to sustain the finding of undue prejudice and preference as between the territories or regions in-

volved if the defendants singly or jointly, directly, or indirectly through connecting lines, serve the same origin or destination points or territories. *Chicago I. & L. Ry. v. United States*, 270 U.S. 287; *Southern Ry. v. United States*, 204 Fed. 465 (Commerce Ct.); *Seneca Wire & Mfg. Co. v. Baltimore & O. R.R.*, 112 I.C.C. 95, and *Lake Dock Coal Cases*, 89 I.C.C. 170. In the cases cited the Commission held that where a carrier or a group of carriers participates in joint rates and is in a position either to continue participation or to decline to do so, such carrier or group may be held responsible for any undue prejudice or preference that arises out of such participation in such rates or in its failure to do so. This doctrine was pointedly recognized by this Court in *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136, in which the Court stated that localities and shippers require protection as much from the combination of connecting carriers as from the action of a single carrier whose rails reach them.

In *New York v. United States*, 331 U.S. 284, the Court sustained an order of the Commission that found the relation between the interterritorial class rates to Official territory from Southern territory and the interterritorial class rates within Official territory resulted in an unreasonable preference of Official territory, as a whole, and of shippers and receivers of freight located therein and in undue prejudice to complaints in Southern territory in violation of Section 3(1). In that case contentions similar to the views of the Nebraska court here challenged were made by the State of New York and certain other parties who challenged the validity of the order of the Commission.

The claim was also made in the *New York* case that under the doctrine of *Texas & Pac. v. United States*, 289 U.S. 627, a Section 3 order of the Commission had to be in the alternative. However, this Court rejected these contentions and said (331 U.S. 341) that:

> "A proper finding of unlawful discrimination under §3(1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to §15, to prescribe the alternative."

And at page 345 the Court also said:

> "Once the Commission has found rates to be 'unjust or unreasonable' or unjustly discriminatory or unduly preferential or prejudicial,' it is empowered to prescribe rates which are 'just and reasonable' or 'the maximum or minimum,' or maximum and minimum, to be charged * * *. §15(1)."

In holding that the Commission in the instant case erred in finding that the intervening complainant shippers before the Commission suffered undue prejudice and preference, the Nebraska court was obviously influenced by its misconception of the decision of the Supreme Court in *Central R. R. of N. J. v. United States*, 257 U.S. 247. In the *New York* case, 331 U.S. at page 342, this Court held in effect that the principle of the *Central R. R. of N. J.* case means merely that "the Commission may not require carriers to do what they are powerless to perform." In the instant case, the Union Pacific and its preferred connections have complete power to eliminate the prejudice and preference complained of.

The *Central R.R. of N.J.* case involved joint rail rates

on lumber which were maintained by southern and northern railroads from points in the south to points in the north, including Newark, N. J., and other points in New Jersey. Railroads in the south provided creosoting in transit on lumber at points on their line, but the Central Railroad of New Jersey and other northern railroads did not provide for creosoting in transit at Newark, N. J., or at other northern points. Upon the complaint in *American Creosoting Co. v. Director Gen.,* 61 I.C.C. 145, the Commission found that the refusal of the northern railroads to provide creosoting in transit at Newark, N.J. was unduly prejudicial to complainant. This finding was reversed by this Court on two grounds—first, that the establishment of transit at particular points on particular commodities is a local matter for each railroad to decide; and second, that the fact that the northern railroads participated with southern railroads in joint rates on lumber did not mean that the refusal of the northern railroads to provide like in-transit privileges at Newark, N.J. was unduly prejudicial.

The facts in the *Central R. R. of N. J.* case are distinguishable from the facts in the instant case, since here the Rio Grande provides in-transit privileges of practically every description at all points on its railroad. In the circumstances there was neither the occasion nor the necessity for the Commission to require the Rio Grande to establish in-transit privileges at points on its line. Moreover, the decision in the *Central R.R. of N.J.* case appears to have been modified, if not overruled by the *per curiam* decision in *Great North-*

ern Ry. v. United States, 336 U.S. 933, in which this Court granted the motion to affirm the judgment of the three-judge court in *Great Northern Ry. v. United States,* 81 F.Supp. 921 (D.C. Del.).

The latter judgment sustained the decision of the Commission in *General Mills, Inc., v. Great Northern Ry.,* 269 I.C.C. 457, in which the Commission required the Great Northern Railway to establish storage in transit at Great Falls, Mont. on wheat and its products originating at points on its line in central Montana and thereafter moved by the Great Northern to Butte, Mont. and thence by its connections to points in Utah, Nevada, Arizona and California, upon the ground that the refusal of the Great Northern to establish such transit at Great Falls was unreasonable and unduly prejudicial to the complainant. The Great Northern relied, *inter alia,* upon the *Central R.R. of N.J.* case in support of its contention that the Commission was without power under Section 3, and because of Section 15(4) of the Act to require the establishment of in-transit privileges at Great Falls and thence via Butte, which would deprive the Great Northern of its long haul through Seattle, Wash., and Portland, Ore., to the destinations involved.

The Commission knew from its own experience and from the evidence in the instant case that the in-transit privileges provided by the Rio Grande were commercially and competitively ineffective, in the absence of competitive joint rates via the route of the Rio Grande. Therefore, the Commission, acting in its administrative capacity, prescribed such competitive joint rates.

It is appropriate to state in passing that in the *Central R.R. of N.J.* case, this Court did recognize that the Commission had the power under Section 1 of the Interstate Commerce Act to determine whether in a particular case in-transit privileges should be granted or should be withdrawn (257 U.S., at p. 257).

Under Section 13(1) of the Interstate Commerce Act, any person, firm, corporation, company or association or any common carrier may complain to the Commission of anything done or anything omitted to be done by any common carrier subject to the provisions of the Act. The shippers and other associations which intervened in the complaint before the Commission in the instant case were authorized to do so under the General Rules of Practice of the Commission. Under the doctrine of the *Chicago Junction Case,* 264 U.S. 258, and *Youngstown Sheet & Tube Co. v. United States,* 295 U.S. 476, the shippers, chambers of commerce and associations which intervened as complainants before the Commission had a right to do so, and the Commission did not err in finding that the restrictions as to routing in connection with the existing rates via Ogden and the Rio Grande on the traffic involved resulted in undue prejudice to such complainants who use or desire to use the Rio Grande routes, and in undue preferences to shippers and others using the Union Pacific routes, in and to the extent that the rates via the Rio Grande routes exceed, or may exceed, the competitive joint rates on the commodities involved from and to the same points over the Union Pacific routes.

From the foregoing it is evident that the holding of the Nebraska court that the prohibitions against undue preference and prejudice under Section 3(1) of the Interstate Commerce Act do not apply to the instant case is erroneous.

IV.

The Errors of the Nebraska Court Require a Reversal of Its Decision

The errors of the Nebraska court requiring a reversal of its decision are as follows:

(1) It substituted its judgment for the judgment of the Commission with respect to administrative findings made by the Commission and supported by substantial evidence, by restricting the relief granted by the Commission to shipments requiring in-transit privileges at points on the Rio Grande west of Colorado common points such as Denver, Pueblo and Trinidad.

(2) It misinterpreted and misapplied Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, particularly in holding that Section 3(1), which prohibits any carrier from giving undue preference to any person, locality, territory or region, or subjecting any person, locality, territory or region to any undue prejudice, does not apply in the instant case, although the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the violations of Section 3(1).

CONCLUSION

For the reasons stated, The Denver and Rio Grande Western Railroad Company respectfully submits:

I.

That the decision of the United States District Court for the District of Colorado, involved in appeals Nos. 332, 333 and 334 should be affirmed, with directions to the Interstate Commerce Commission that it proceed to a determination of the issues on the basis that through routes via the Ogden gateway are in existence, and that the Rio Grande is entitled to have the evidence considered and the case decided by the Commission free of the limitations of Section 15(4); that the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117, 118 and 119 should be reversed and the Order of the Interstate Commerce Commission of January 12, 1953, should be annulled and set aside in so far as it denies to The Denver and Rio Grande Western Railroad Company the relief prayed for in its complaint.

II.

In the alternative, in the event the decision of the United States District Court for the District of Colorado is not affirmed, that the decision of the United States District Court for the District of Nebraska involved in appeals Nos. 117, 118 and 119 should be reversed, and the Order of the Interstate Commerce Commission should be affirmed.

Respectfully submitted,

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March 12, 1956.

APPENDIX A

FORMAL ORDER OF INTERSTATE COMMERCE COMMISSION

JANUARY 12, 1953

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendant named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeed-

ing paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD, *Acting Secretary.*

(SEAL)

APPENDIX B

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT (UNITED STATES CODE, TITLE 49)

Statutory declaration of National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4)—Title 49

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish rea-

sonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(5)—Title 49

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 1(15)—Title 49

"Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the

operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Section 3(1)—Title 49

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corpora-

tion, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4)—Title 49

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

Section 6(1)—Title 49

"Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and

points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Section 13(1)—Title 49

"Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter

in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15(1)—Title 49

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions

of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—Title 49

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addi-

tion to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15(4)—Title 49

"In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more conomic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In

time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—Title 49

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this chapter to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this chapter provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where com-

peting lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

APPENDIX C

ROUTES AND DISTANCES

Between North Portland, Ore. and St. Louis, Mo.

ROUTE	*MILES*	*CIRCUITY*
1	2167 (Via Kemmerer, Wyo.)	Short Route
	2232 (Via Ogden, Utah)	3%
2	2367	9%
3	2405	11%
4	2407	11%
5	2422	12%
6	2461	14%
7	2468	14%
8	2492	15%
9	3134	45%

EXPLANATION OF ROUTES

1. UP-Kansas City, Mo., Wab.
2. UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wab.
3. UP-Spokane, Wash., GN-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab.
4. UP-Plummer, Ida., CMStP&P-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab. (See Note)
5. UP-Marengo, Wash., CMStP&P-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab. (See Note)
6. UP-Spokane, Wash., SI-Eastport, Ida., CP-North Portal, Sask.-Portal, N.D., Soo-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab.
7. UP-Wallula, Wash., NP-St. Paul, Minn., CRI&P-Des Moines, Ia., Wab.
8. UP-Portland, Ore., SP-Ogden, Utah, UP-Kansas City, Mo., Wab.
9. UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P-Kansas City, Mo., Wab.

NOTE—Applies only on westbound traffic.

DISTANCES
VIA UNION PACIFIC

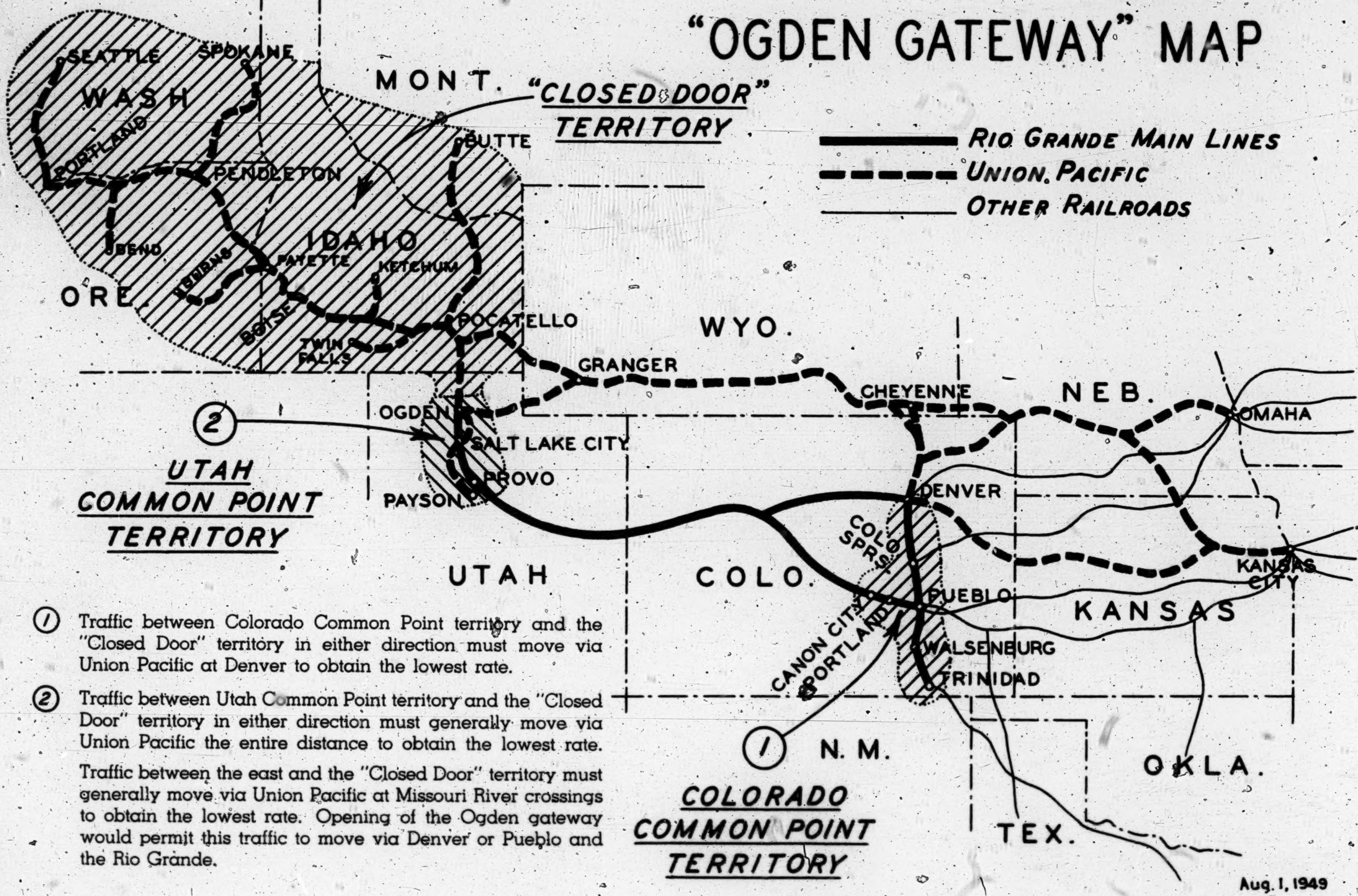
BETWEEN

North Portland	Ore.	*Miles*
AND		
Portland	Ore.	8
Wallula	Wash.	215
Marengo	Wash.	311
Spokane	Wash.	372
Plummer	Ida.	385
Ogden	Utah	851
Kansas City	Mo.	1893 (Via Kemmerer, Wyo.)
		1958 (Via Ogden, Utah)

CANADA
CANADA
ILLUSTRATIVE MAP
U.P. Lines involved shown in Red
Rio Grande Lines involved shown in Green
Other Railroad Lines involved shown in Black
Spokane (GN-SI)
Marengo (CMStP&P)
Plummer (CMStP&P)
Wallula (NP)
No. Portland
Portland (SP)
McCammon
Kemmerer
Granger
Ogden
Salt Lake City
Provo
Omaha
Denver
MOFFAT TUNNEL ROUTE
MOFFAT TUNNEL ROUTE
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
IOWA
WISCONSIN
ILLINOIS
COLORADO
1
2
3
4
5
6
7
8

APPENDIX D

"OGDEN GATEWAY" MAP



(1) Traffic between Colorado Common Point territory and the "Closed Door" territory in either direction must move via Union Pacific at Denver to obtain the lowest rate.

(2) Traffic between Utah Common Point territory and the "Closed Door" territory in either direction must generally move via Union Pacific the entire distance to obtain the lowest rate.

Traffic between the east and the "Closed Door" territory must generally move via Union Pacific at Missouri River crossings to obtain the lowest rate. Opening of the Ogden gateway would permit this traffic to move via Denver or Pueblo and the Rio Grande.

Aug. 1, 1949

Map showing territory* to which eastbound thru routes and joint rates via the Ogden Gateway were not prescribed by the ICC in its decision of January 12, 1953 in Docket No. 30297. The complaint sought thru routes and joint rates to this territory as well as to the territories to which the Commission prescribed thru routes and joint rates.

*cross-hatched hereon.

Ogden
MOFFAT TUNNEL ROUTE
Salt Lake City
Provo
NEVADA
UTAH
ARIZONA
NEW MEXICO
CALIFORNIA
PACIFIC OCEAN
COLORADO
Denver
Colorado Spgs.
Pueblo
Trinidad
KANSAS
Kansas City
St. Louis
MISSOURI
ILLINOIS
OKLAHOMA
ARKANSAS
TEXAS
El Paso
SAN FRANCISCO
LOS ANGELES

MOFFAT TUNNEL ROUTE
MOFFAT TUNNEL ROUTE
ROYAL GORGE ROUTE
The only corner common to four states in the United States
COLO. NAT'L MONUMENT
BRYCE CANYON NAT'L PARK
ZION NAT'L PARK
GRAND CANYON NAT'L PARK
NATURAL BRIDGES NAT'L MON.
MESA VERDE NAT'L PARK
YOSEMITE NAT'L PARK
SEQUOIA NAT'L PARK
LASSEN VOLCANIC NAT'L PARK
CRATER LAKE NAT'L PARK
ROCKY MTN. NAT'L PARK
Great Salt Lake
Lake Tahoe
HOOVER DAM
PACIFIC OCEAN
CALIFORNIA
NEVADA
UTAH
ARIZONA
COLORADO
NEW MEXICO
NEBRASKA
KANSAS
IOWA
ILLINOIS
MISSOURI
OKLAHOMA
ARKANSAS
TEXAS
TENN.
MISS.
SAN FRANCISCO
OAKLAND
SACRAMENTO
LOS ANGELES
LONG BEACH
SAN DIEGO
RENO
CARSON CITY
OGDEN
SALT LAKE CITY
PROVO
DENVER
COLORADO SPRINGS
PUEBLO
DURANGO
ALAMOSA
SALIDA
TRINIDAD
PHOENIX
OMAHA
LINCOLN
TOPEKA
WICHITA
KANSAS CITY
JEFFERSON CITY
St. Louis
DES MOINES
SPRINGFIELD
CHICAGO
OKLAHOMA CITY
LITTLE ROCK
DALLAS
FT. WORTH
DANIEL-SMITH CO. DENVER COLORADO
2-1-53

APPENDIX F

SUMMARY OF TESTIMONY OF TYPICAL WITNESSES

Anton Poitevin, President of the Idaho Potato Growers, testified that his organization had 1200 members and shipped 5,000 cars of potatoes in 1948 for such members (Consol. R., I, 500); that the Idaho Potato Growers annually shipped 10% of the Idaho crop, and that he had personally grown and shipped as high as 200 cars of potatoes in a year. He testified that the Idaho Potato Growers favored the establishment of the joint rates sought by complainant (Consol. R., I, 500, 501).

He stated that the Idaho potato, while in demand throughout the United States, is not produced close to the larger markets and is always sold at a freight rate premium. For this reason there should be no rate handicap upon the sale of Idaho potatoes.

Many potato growers and shippers in Idaho produced evidence as to the importance of free and flexible routing of their product and as to the injury they had suffered because of the present rate and routing restrictions.

M. M. Bass (Consol. R., I, 242 *et seq.*) and *A. G. Stanger* (Consol. R., I, 250 *et seq.*) of Idaho Falls, Idaho, testified for the Idaho Falls Bonded Produce and Supply Company. In the last fiscal year this organization shipped 1,063 units of potatoes and onions (Consol. R., I, 245). Bass stated that closed gateways restricted markets of his organization (Consol. R., I, 243). Stanger stated that shippers and producers should have the right to route their products and at present they were restricted to the Union Pacific (Consol. R., I, 251).

In explanation of what he thought could be produced

by beneficial competition, Stanger cited a rate of $4.31 per hundred from Idaho Falls to New York on processed turkeys as compared to a rate of $3.51 per hundred from Cedar City, Utah. The same rate ($3.51) applied from Richfield, Utah, which is located on the Denver and Rio Grande. Richfield and Cedar City are competitive shipping points and are on different railroads. The comparative mileage from the three towns to market for rate-making purposes is the same.

Both men testified as to the need for flexible routing and for reconsigning privileges also as to the restrictions now effective on their shipping activities by the present rate barriers which bring about danger of being caught in the so-called "pocket markets."

L. E. Stephens of Blackfoot, Idaho (Consol. R., I, 247 *et seq.*), *C. R. Holden* of Idaho Falls (Consol. R., I, 292 *et seq.*), *P. G. Batt* of Caldwell, Idaho (Consol. R., I, 420 *et seq.*), *T. S. Vanderford* of Aberdeen, Idaho (Consol R., I, 472 *et seq.*), *Wayne Newcomb* of Burley, Idaho (Consol. R., I, 438 *et seq.*), *Jack Adams* of Idaho Falls (Consol. R., I, 474 *et seq.*), *W. B. Long* of Twin Falls, Idaho (Consol. R., I, 477 *et seq.*), and *L. D. Robbins* of Twin Falls (Con. R., I, 479 *et seq.*), all presented additional testimony as to the "pocket markets" and the restrictive effect on their business of being completely dependent upon the Union Pacific for rates, routes, cars and diversion privileges.

J. F. Watson of Parma, Idaho, testified that he is Vice-President and General Manager of the J. C. Watson Company of Parma, which is engaged in the production, packing and distribution of fresh fruits and vegetables, such as peas, lettuce, prunes, apples, potatoes and onions, and that these products are marketed throughout the United States and part of Canada (Consol. R., I, 432 *et seq.*). That company ships an-

nually from 1500 to 2000 cars. It is constantly seeking new markets. Watson supported the complaint, and testified that joint rates through the Ogden gateway and the Rio Grande should be established so that there could be a free flow of fruits and vegetables from Idaho to all markets (Consol. R., I, 432 *et seq.*). Watson also testified that relief sought by complainant would give producers in Idaho wider distribution and more markets, especially into the southwestern territory, which he considers a logical market (Consol. R., I, 432, 433).

He also testified that in shipping fruits and vegetables from Idaho these commodities frequently encounter market areas which may be called "pocket markets." That phrase means that certain shipments reach points in Kansas, such as Wichita and Hutchinson, which are not served by the Union Pacific, and if for any reason the shipments are rejected or cannot be sold at a satisfactory price, the shipments cannot be reconsigned to Kansas City or points east under the existing rate restrictions. If such shipments are re-shipped from points in Kansas, Oklahoma or any points south of the Union Pacific line to points east of the Missouri River, they must pay the combination rates to and from the "pocket market" (Consol. R., I, 433). If the joint rates sought by the complaint are established, these "pocket markets" in Kansas and Oklahoma will be eliminated.

Watson gave certain examples of the difficulties encountered and the additional expense incurred when shipments are distressed in a "pocket market." One example related to a car of potatoes from Notus, Idaho, on August 5, 1949, consigned to Wichita, Kansas, which was invoiced at $506.00. The car was rejected. Attempts were made to sell the potatoes in other markets, but because the car was "off the Union Pacific" it could not be marketed east of Kansas City without paying combination rates over Wichita. After making unsuccess-

ful efforts to dispose of the car without a loss, the original buyer offered $317.00 for the car. The car was sold to the original buyer at that figure, which meant a loss of $189.00 (Consol. R., I, 433, 434).

In addition, Watson cited an example of a car of lettuce to Wichita on which the loss was $218.40, and another car to Liberal, Kansas, which likewise was finally sold at a loss. He stated that he had 15 to 20 such distressed cars in a year's time, and that he had always been so handicapped (Consol. R., I, 434-436).

John W. Gerber is Executive Secretary and General Manager of the Utah Growers Cooperative (Consol. R., I, 465 *et seq.*), which has approximately 450 members (Consol. R., I, 468), and supported the complaint of the Rio Grande. The Cooperative operates two branches on the Union Pacific and three on the Rio Grande. The latter are at American Fork, Springville and Midvale (Consol. R., I, 465), all south of Salt Lake City in Utah. He would like to buy box crate material in Idaho and ship to his American Fork and Springville sheds on the Rio Grande, but the lowest rate does not apply via the Rio Grande in connection with the Union Pacific (Consol. R., I, 465, 466). To his Midvale shed he has to absorb a switching charge on this traffic (Consol. R., I, 465, 466). On manufactured fertilizer purchased for his growers at Pocatello, Idaho, and Anaconda, Montana, he stated that "it necessitates a combination of rates at Ogden or Salt Lake, or the trucking of this fertilizer across town at the two main operations, American Fork and Springville (Consol. R., I, 466). The same is true with seed potatoes obtained in Idaho and Montana (Consol. R., I, 466). On seed potatoes obtained in the Red River Valley of North Dakota (Consol. R., I, 466, 470) he would like to unload part carload shipments at Springville, American Fork, Midvale (at Rio Grande locations at all points) and "go into north of Ogden"

(Consol. R., I, 466). This cannot be done and have the through rate protected under present status (Consol. R., I, 466).

The markets east of the Mississippi River have been greatly limited because of post-war rate increases and because of increases in estimated weights on celery and carrots (Consol. R., I, 466, 471). This necessitated going into smaller markets, *viz.*, Idaho, Montana, Wyoming, Nebraska, by truck (Consol. R., I, 466, 467). He can not at present move his vegetables from American Fork, Springville and Midvale on the Rio Grande to Idaho and Montana without a penalty (Consol R., I, 467). He closed his Corrine operation this year (1949) and moved the celery produced in that area to Midvale by truck "so that we would not get into the so-called 'pocket markets' of the Southwest that we would be bound to reach moving via UP to Denver, and transferring on to other lines" (Consol. R., I, 467).

Gerber had 100 members in the district north of Ogden, and they would like to be able to load their onions and potatoes, ungraded, and move them to packing sheds at American Fork and Springville and process in transit and go on, which they cannot presently do (Consol. R., I, 467). His outbound business ranges from 600 to 1100 cars (Consol. R., I, 468). In bringing in cars via Union Pacific (*i.e.*, at Springville or American Fork) he *could* haul the traffic across town, but because of lack of icing facilities in summer and because of danger of freezing (seed potatoes) in winter, he does not do this (Consol. R., I, 468, 469).

W. S. Miller (Consol. R., I, 531 *et seq.*) is Manager of the Umatilla Canning Company in Milton, Oregon. This company is a farmers' cooperative and processes and sells fruits and vegetables for its farmer

members (Consol. R., I, 531). The principal markets for these canned products are distributed over a wide area and the company will ship 150 carloads of canned goods and 150 carloads of frozen goods this year (1949) (Consol. R., I, 532).

Two transportation factors that are important to this shipper are "time" and "temperature" (Consol. R., I, 533). Extreme temperatures have a detrimental effect on canned goods (Consol. R., I, 534) and if possible he would prefer to so route his products as to avoid storm areas. The rates sought here would be beneficial to his company (Consol. R., I, 533). His company is new and it is necessary to develop markets in the Southwest (Consol. R., I, 535, 536). Usually each car stops three times for partial unloading (Consol. R., I, 535). It cannot ship into the Colorado area because it cannot partially unload and ship on under a joint through rate. If one railroad gets blocked because of storm or other conditions he wants another with equal rates (Consol. R., I, 540).

Donald L. Reed (Consol. R., I, 140 *et seq.*), President of the Skyland Food Corporation, Delta, Colorado, testified that this company is engaged in the operation of a frozen food plant at that point, processing mostly fruit; that the capacity of the plant at Delta is about 15 million pounds annually, and that the average usage of his plant is about 50 per cent of capacity (Consol. R., I, 141). He also testified that, in addition to fruits procured in Western Colorado for processing at Delta, he also gets fruit from Utah points and could use apples from Idaho (Consol. R., I, 141, 142). He cannot, as a general rule, afford to obtain apples from Idaho for processing at Delta because of the absence of through competitive rates from Idaho by way of the Rio Grande through Delta to final destination. If through rates via Ogden and the Rio Grande were

available, he could likewise procure fruit in the Brigham area (Brigham, Utah, north of Ogden) and process that fruit in transit at Delta (Consol. R., I, 143). At present the fruit obtained in the Brigham district is trucked to Ogden and loaded there on the Rio Grande (Consol. R., I, 143).

Reed also testified that he might purchase 100 to 200 carloads of Idaho apples (per year) if he had joint competitive rates from Idaho through Delta (for processing) and that this would be new business for his company (Consol. R., I, 145). He does not operate his plant to capacity at the present time because of his inability to get sufficient quantities of fruit (Consol. R., I, 146). If he could run his plant another 30 to 60 days, particularly on apples, he could increase his capacity (Consol. R., I, 147), but the total of fruits now available to his processing plant is not enough to satisfy his demand (Consol. R., I, 147, 148). Because of the great difference in the type of fruit, he cannot use California fruit in his operations. (Consol. R., I, 148).

LeRoy Snooks (Consol. R., I, 196 *et seq.*), Manager of the North Ogden (Utah) Fruit Exchange, a cooperative having about 70 members, testified that the members of his cooperative ship about 20-25 cars of cherries, 50-60 cars of apricots and 50-60 cars of peaches annually, and that a good portion of their apricots and peaches are shipped to witness Reed's processing plant at Delta, Colorado. They are trucked into Ogden and shipped by rail from there (Consol. R., I, 197). Two or three hundred tons of apricots were lost last season because of the high expense of trucking from Brigham to Ogden (18 miles) (Consol. R., I, 198). Fifty per cent of the peaches and apricots produced by the Exchange over a period of years are shipped to Delta (Consol. R., I, 201), but this year (1949) a portion was not marketed because that por-

tion could not be trucked to Ogden and shipped to Delta for processing at a profit (Consol. R., I, 201). This cooperative's problems would be solved by the establishment of joint competitive rates with the Union Pacific and Rio Grande via Ogden.

L. L. Belcher (Consol. R., I, 302 *et seq.*), Pueblo, Colorado, is President and General Manager of the Mountain Ice & Coal Company, which company has a cold storage plant at Pueblo with capacity of 75 carloads. He testified that he could store frozen foods (for example) from Oregon and Washington which moved over the Union Pacific if the Ogden gateway were opened at competitive joint rates (Consol. R., I, 304, 305). Because such through rates do not apply via Ogden and Pueblo, and because his destination (transit) territory is limited to points west of the Missouri River if the traffic moves via Union Pacific to Denver, thence via connecting lines to Pueblo, he does not presently obtain any of this traffic for storage in his plant. He also testified that if the Ogden gateway were opened, Pueblo would be in line of transit on traffic destined to Denver, which would be of advantage to his company (Consol. R., I, 305, 306, 307). He further stated that if the rates which complainant seeks were established, it would set up Pueblo as a point that would have transit and competitive rates to practically every place (Consol. R., I, 308).

Herbert P. Heidel (Consol. R., I, 412 *et seq.*), Pueblo, Colorado, testified that his company (The Lincoln Packing Division of the American Stores, Inc., Pueblo, Colorado) has a storage warehouse at Pueblo with a capacity of between 200 and 250 carloads (Consol. R., I, 412). He can store all kinds of perishable commodities, but the commodities that can be stored in transit at Pueblo when coming from Idaho, Oregon

and Washington via the Union Pacific are limited to apples, pears and other fruits. He cannot store turkeys, potatoes, onions and frozen foods which move from the Northwest via the Union Pacific because of the absence of through rates via Pueblo. In this regard he supported the testimony of Mr. Belcher (Consol. R., 1, 413).

J. L. Pease (Consol. R., II, 1069) testified for the United States Department of Agriculture. He stated that the Secretary of Agriculture intervened in behalf of the complainant according to certain United States statutes which require the Secretary to interest himself in transportation of the products of agriculture (Consol. R., II, 1069). Dr. Nelson (Consol. R., I, 177 *et seq.*) testified as to the industrial growth of the northwestern states. Mr. Pease prepared an exhibit as to agricultural products. The exhibit indicates the large volume of production and the need for as nearly unrestricted channels of distribution as possible. All areas of consumption are needed now for the disposal of agricultural production and all means of reaching these areas are important (Consol. R., II, 1070). Members of Idaho Potato and Onion Association have asked him for the past five years "When are we going to get the Ogden gateway open?" (Consol. R., II, 1074).

Pease stated that the Department of Agriculture is opposed to any routing restrictions on agricultural commodities (Consol. R., II, 1077). After consideration by all members of staff in his department they determined that it would be for the best interests of the agricultural community of the Northwest as a whole if the Secretary of Agriculture intervened in behalf of the complainant (Consol. R., II, 1079). In his opinion it would be better for agricultural producers if the joint rates were established (Consol. R., II, 1080, 1081).

In support of the position taken by the Secretary of Agriculture are numerous farm organizations. To mention a few of these, the Idaho Farm Bureau Federation composed of some 11,000 farm families in Idaho intervened in behalf of the complainant and *J. Cyril Lau*, President of the Federation, testified at Boise, Idaho (Consol. R., I, 551 *et seq.*).

Lau testified that he was directed by his board of directors to appear as a witness and stated that the Federation favored the complaint because of the better service, better car supply and more rail routes at equal rates that would be the result if complainant was successful. He stated that the Federation believed that the shipper should have the right to choose the roads over which to ship their products without penalty (Consol. R., I, 554). In the witness' opinion competition would improve the transportation service (Consol. R., I, 560).

Bert Higgins (Consol. R., I, 262 *et seq.*), a member of the Executive Committee of the Idaho State Grange, testified that the Grange was in favor of the complaint and desired to see the joint rates established. He stated that the Grange had 12,000 adult members in Idaho and that it was necessary to be a farmer before you could be a member of the Grange (Consol. R., I, 262). It was the opinion of the Grange members that transportation competition would improve the service and the car supply in Idaho (Consol. R., I, 267).

Cy Davis (Consol. R., I, 224 *et seq.*), Manager of the Idaho Falls Chamber of Commerce, stated that his organization supports the complaint. The Chamber has a membership of 618 and Idaho Falls is an important shipping point for agricultural products (Consol. R., I, 225). It is the position of the Chamber that all

rail facilities should be made available to the shipper at equal rates (Consol. R., I, 225).

Fred Simpson, Jr. (Consol. R., I, 405 *et seq.*), Colorado Springs, Colorado, whose company's name is Simpson & Company, and who is also affiliated with the Robinson Grain Company of Colorado Springs, is a shipper of dried beans and a transit operator at his warehouses in and adjacent to Colorado Springs (Consol. R., I, 405, 408). He brings beans from the West into his transit houses in straight carloads and ships out in various different packages and different or assorted varieties of beans. His destination territory is largely in the Southeast. For the year ending September 1, 1949, he shipped a total of 390 cars, each weighing 80,000 pounds.

He has lost business in many instances because he could not furnish Idaho red beans and Idaho Great Northern beans in his assorted cars from Colorado Springs (Consol. R., I, 407). He testified that, because of the rate situation (*i.e.,* because of the absence of the through rates which this complaint seeks), he never brings Idaho beans through Colorado Springs and consequently he cannot offer a full line of beans to the trade (Consol. R., I, 406, 407). If he purchased Idaho red beans or Great Northern beans in Idaho, and brought them through Colorado Springs via the Ogden gateway, he would pay a 39-cent higher rate to transit those beans at Colorado Springs (Consol. R., I, 407, 408).

Max Osborn (Consol. R., I, 408 *et seq.*), Fruita, Colorado, is a shipper of beans, operating under the name of The Osborn Bean and Elevator Company, and testified that his situation is substantially similar to that of Simpson (Consol. R., I, 411). He has run into difficulty in fulfilling the requirements of his trade for

mixed cars of beans. He cannot, on account of the combination of rates existing via Ogden, use Idaho beans in his transit operations at Fruita (Consol. R., I, 409). He trucks in Great Northern beans from Idaho (Consol. R., I, 409). He cannot handle peas from Idaho for the same reason as the one that prevents him from handling Idaho beans (Consol. R., I, 410). He would have to pay combination rates on the Idaho varieties which were transited at Fruita and went east, which would be prohibitive (Consol. R., I, 410). He handles between sixty and seventy 80,000-pound cars per year (Consol. R., I, 411).

C. A. Harris (Consol. R., I, 231 *et seq.*), a wheat farmer and implement dealer from Idaho, testified as to the restriction on the movement of wheat produced by him and other Idaho farmers into the Southwest markets, particularly at Wichita. He stated (Consol. R., I, 236) that there was a rate differential of 27½ cents over the Rio Grande as compared to the Union Pacific on wheat moving from Idaho to Wichita and that the gateways into the southern territory beyond Wichita were not open via any route (Consol. R., I, 237).

E. E. Kohlwes (Consol. R., I, 358 *et seq.*) represented and testified for a group of mills located in south-central Kansas. The interest of these mills lies in their inability to purchase wheat in the Pacific Northwest for movement into the specified milling points in Kansas for processing or storage, and subsequent reshipment from such processing or storage points in Kansas to Kansas City or beyond, on the basis of the direct through competitive rate (Consol. R., I, 359, 360).

He cited a specific example of a movement of nine cars of wheat from Idaho Falls, Idaho, to Moundridge,

Kansas. These cars moved Union Pacific to Denver, Rio Grande to Pueblo, Colorado, and Missouri Pacific to Moundridge. After being processed into flour the wheat moved from Moundridge to Pennsylvania. The through rate from Idaho to Pennsylvania aggregated \$1.33½ per hundred. If the joint rates sought had been applicable the through rate would have been \$1.21 per hundred (Consol. R., I, 360, 361). The Moundridge mill is thus penalized 12½ cents per hundredweight if Idaho wheat is to be used in producing flour at that point.

Kohlwes stated that the production of bakery products had become highly specialized and in order for these mills to meet the specifications that bakeries have established, it is necessary to originate and blend different grades, types and qualities of wheat in order to produce the desired quality flour. It is therefore necessary for the millers to procure a certain amount of wheat requirements in the Northwest (Consol. R., I, 361). The present rate situation restricts their ability to purchase wheat and limits their ability to move outbound with the finished product (Consol. R., I, 363, 364). His interest in the case is to obtain an equality of rates (Consol. R., I, 367).

L. R. Ginn (Consol. R., I, 369 *et seq.*), a grain buyer for the Kansas Milling Company, one of the companies which Kohlwes represented, testified as to the purchase of wheat for his company. He stated that wheat must be purchased according to the demands of the bakery trade and that some wheat mixes required 12 to 25 per cent of soft white wheat which is produced in the Pacific Northwest (Consol. R., I, 370). This was done to correct a lack of the desired element in Kansas wheat (Consol. R., I, 371).

In the purchase of wheat Ginn stated that he is lim-

ited by lack of joint through rates. He stated that he is often limited to a purchase of 5,000 bushels when he needs 25,000 bushels because of the lack of joint rates from Idaho into Kansas (Consol. R., I, 372). He stated that last year 385,000 bushels of this white wheat from the Northwest was purchased by his mill alone, but only 60,000 bushels originated on the Union Pacific. The balance of his purchases moved via Pueblo and originated on the Great Northern or the Northern Pacific (Consol. R., I, 373). Ninety to ninety-five per cent of his wheat must originate on a railroad other than the Union Pacific in order to overcome the freight rate disadvantage (Consol. R., I, 366).

The livestock organizations that were represented at the various hearings all supported the complaint and their witnesses testified as to the injury caused the livestock industry because of the present rate restrictions.

Roger S. Smith, of Denver, Colorado, Superintendent of Livestock operations of the Holly Sugar Corporation, testified that his company has sugar factories, among other places, at Delta and Swink, Colorado. He stated that there would be between 25 to 60 thousand tons of beet pulp available annually for feeding cattle and lambs at Delta, Colorado, located southeast of Grand Junction, Colorado, on the Rio Grande (Consol. R., I, 270). Also available are several thousand tons of molasses. He purchases livestock on the Union Pacific in Montana (440-450 head of cattle in 1948; 500 head in 1949) (Consol. R., I, 275, 276), but cannot move them to Delta for feeding in-transit at through competitive rates (Consol. R., I, 273). The livestock produced in the Northwest, "particularly in Idaho and Western Montana on the Union Pacific, is of excellent grade for use in our feeder operations on the D&RG and elsewhere" (Consol. R., I, 274). The higher basis of rates applicable from north of Ogden via the Rio

Grande hinders his operations on the D&RG and favors the operations of livestock feeders on the Union Pacific in Wyoming and Nebraska (Consol. R., I, 274).

He tries to buy his livestock as close to his feeding operations as possible, but at times has to reach way out to outlying districts (Consol. R., I, 279). He had buyers in western Montana territory this fall (1949) purchasing cattle at considerable less money than he had to pay for feeder cattle adjacent to the Delta factory (Consol. R., I, 281). These cattle, however, could not move to his Delta operation. In view of this, it is the desire of the Holly Sugar Corporation to have all possible routes open and available at competitive rates so that it can go to the purchasing areas where they can get the lowest price (Consol. R., I, 281).

Worth Stimets, Colorado Springs, Colorado, Chief Rate Clerk in the Traffic Department of the Holly Sugar Corporation, testified that the difference in rates, per cwt., on feeder cattle to Denver varies from a high of 35 cents from Divide, Montana, to a low of 31 cents from Idaho Falls, Idaho, over the direct Union Pacific rate when routed UP-D&RGW via Delta, Colorado (for feeding in-transit). He also testified that on sheep from Idaho and Montana points on the Union Pacific to Omaha, Kansas City, and Chicago, the rates via Union Pacific-Rio Grande-Union Pacific are 19 cents per cwt. higher than via Union Pacific direct from and to the same points (Consol. R., I, 288). Other examples of rate differences via the Rio Grande route were also shown by Mr. Stimets. On cattle from Divide, Montana, to Chicago, the difference in the rate is 57 cents per cwt. higher via the Rio Grande route (Consol. R., I, 289).

I. H. Jacob, Salt Lake City, Utah, is General Manager of the Producers Live Stock Marketing Associa-

tion and President and General Manager of the Wasatch Live Stock Loan Company. He has been connected with the livestock business all his active life. He has been in the livestock business since 1915 (Consol. R., I, 310). The Producers Live Stock Marketing Association is composed of producers (about 30,000 shippers) (Consol. R., I, 315) and markets its livestock, has its main office in Salt Lake City, operates in the eleven western mountain states, and has other offices in Ogden and North Salt Lake, Utah; Los Angeles, California; Denver, Colorado, and Billings, Montana. It is also affiliated with the National Live Stock Producers Association, intervener in support of complainant in this case. The Wasatch Live Stock Loan Company is an organization of livestock producers to take advantage of the discount facilities of the Federal Intermediate Credit Bank on loans to livestock producers, It has loans in Nevada, California, Utah, Idaho, Wyoming, Colorado and Arizona.

The Producers Live Stock Marketing Association handled the equivalent of 30,000 carloads of livestock, valued at about $110,000,000.00 in 1948, of which amount the witness testified that about 15,000 carloads moved by rail (Consol. R., I, 311). This witness testified (Consol. R., I, 317) that Colorado has an excellent summer pasture area to produce a certain type of lamb, the best source of supply for which has been the Northwest (Consol. R., I, 317, 318). It is the duty of his association, as a cooperative, to give the best service possible to its members (Consol. R., I, 318), and it is in the interest of his association to see that the stock it handles for its members moves in to feed or to range on the Rio Grande without penalty, that is, at the same rates as if they moved over the Union Pacific direct (Consol. R., I, 319).

T. Harry Benton, Burns, Colorado, is President and General Manager of the Benton Land and Livestock Company, which owns 16,000 acres and leases 30,000 acres of land in Western Colorado. It also has forest permits for grazing 970 head of cattle (Consol. R., I, 331). This company does not breed cattle, but buys its livestock wherever it can and fattens the stock thus obtained on their lands adjacent to the Rio Grande in the vicinity of Burns, Colorado (Consol. R., I, 331, 332). This witness testified that it would be advantageous to his operations if the Ogden gateway were opened, as he would then go into that territory (*i.e.,* Idaho, Oregon, Washington, Montana) and purchase the livestock on a "feed in transit" basis (Consol. R., I, 332, 333).

Benton also testified that he made a special trip to the Northwest this last season (1949) and endeavored to purchase cattle there. There had been a drought and grasshopper infestation in Montana and he thought he might be able to purchase some distressed cattle out there at a favorable price, but because of "not having through rates from that territory" he found that buyers from Iowa and St. Paul could afford to pay more for the cattle than he could (Consol. R., I, 334). Because of the gradual reduction in available grazing territory in the national forests, the grazers in his territory produce more winter feed and have gone into feeding operations on a larger scale, rather than to remain a breeding and grazing operation (Consol. R., I, 388). Opening of the Ogden gateway "would open up a territory for us to try and purchase our young stock in" (Consol. R., I, 337). Average outbound shipments from this witness's company at Burns in recent years have averaged 50 to 75 carloads of cattle (Consol. R., I, 339).

David G. Rice, Jr., Denver, Colorado, is Secretary of the Colorado Cattlemen's Association with 5,000

members (Consol. R., I, 344, 356), and testified that livestock feeders in Colorado have "to go more and more out of Colorado to purchase these animals" (*i.e.*, for their feeding operations) (Consol. R., I, 347). "A majority of the big operators go out of Colorado to buy at least a portion of their numbers which they feed" (Consol. R., I, 348). The forest service grazing areas being cut down made it a problem where "we would get our cattle to feed." This came up in connection with the development of the feeding program for the North Fork Valley, on the Rio Grande (Delta County, Colorado) (Consol. R., I, 348). Rice testified that "It was hard for them to purchase cattle in this area (*i.e.*, the Northwest) and be on a competitive basis, due to their feed in transit rates." His association is very much interested in the opening of the Ogden gateway because its members want to buy on a competitive basis for feeding in transit, especially for the Western Colorado areas and Arkansas Valley areas (Consol. R., I, 349, 350).

W. H. Hilbert, Denver, Colorado, is head of the sheep department at Denver for the Producers Livestock Marketing Association. Mr. Hilbert testified (Consol. R., I, 453) that, based on his 34 years' experience in the livestock business, the opening of the Ogden gateway would give livestock producers another important route without a rate disadvantage and would place them on a parity in the sale of their livestock as far as freight rates are concerned.

Herbert P. Heidel, of Pueblo, Colo., is with the Pueblo Division of the American Stores, Inc., Lincoln Packing Division, which is engaged at Pueblo in cold storage operations and in the slaughter of livestock. While Heidel testified under subpoena served by complainant, his testimony clearly shows that it is to the interest of the company he represents to have the joint

rates sought by the complainant. At the Pueblo plant there are regularly received carload shipments of lambs which originate in Idaho and Oregon on the Union Pacific, from which points competitive joint rates apply to Pueblo via the Union Pacific to Denver and thence Santa Fe, Colorado & Southern, or the Rio Grande to Pueblo, but do not apply via Ogden and the Rio Grande. The plant at Pueblo is served by the rails of the Rio Grande (Consol. R., I, 413). When the traffic moves via Ogden and the Rio Grande, the through charge based on combination of rates over Ogden is applied (Consol. R., I, 414). The aggregate of the combination through charge exceeds the through charge via the Union Pacific through Denver by from \$70.00 to \$80.00 per car. Despite that fact, Heidel testified that the lambs from points on the Union Pacific move through Ogden and the Rio Grande to Pueblo because the service via that route is more expeditious than via the route of the Union Pacific through Ogden and Denver and avoids the necessity of stopping the lambs to feed and the incident loss therefrom by shrinkage, etc. (Consol. R., I, 414, 415). When the lambs move through Ogden and the Rio Grande, the extra stop for feeding is not necessary; but such a stop is frequently necessary when the lambs move via the Union Pacific via Denver (Consol. R., I, 415). Even though the expense incident to the extra stop for feeding does not offset the extra transportation charge, ranging from \$70.00 to \$80.00 a car, exacted when the lambs moved through Ogden and the Rio Grande, that route is now used because the industry represented by Heidel finds the service through that route "more adequate" (Consol. R., I, 415). This is but another way of saying that from the shipper's standpoint the service of the Union Pacific through Denver to Pueblo on the livestock in question is inadequate.

Elmer J. Wagner, Lamar, Colorado, is the President of the Arkansas Valley Stock Feeders Association which has 215 members. This association is located and carries on its livestock feeding operations in the valley of the Arkansas River, east of Pueblo, Colorado, on the lines of the Santa Fe and the Missouri Pacific railroads. Its members wish to be able to purchase feeder livestock in Idaho, Oregon, Washington and Montana on a competitive basis with feeders of livestock in other localities, viz., Northern Colorado and Nebraska. At one time, for some years prior to 1932, livestock feeders in the Arkansas Valley could buy feeder lambs in large numbers in eastern Oregon because then, contrary to the general application of rates on all other traffic, the freight rates on livestock from certain points on the OWR&N were the same via OWR&N-OSL to Ogden, and thence via D&RGW and connecting lines to slaughter points on the Missouri River and east thereof (with feeding in-transit at Arkansas Valley points in Colorado) as via UP lines direct (Consol. R., I, 488). Also, prior to 1932, it was the custom for Colorado range men to buy old ewes and lambs in Oregon, and summer them along the D&RGW in Colorado and then to move them into the Arkansas Valley for further fattening (Consol. R., I, 488, 489).

Since 1932, when competitive rates via the Rio Grande route were cancelled, feeders to the north of the Arkansas Valley, along the UP, can overbid the Arkansas Valley feeders. Witness Wagner states (Consol. R., I, 489), "We like the Northwest lambs and would like to buy them if we had the same freight rate advantage" (Consol. R., I, 489). He further testified (Consol. R., I, 490), "In 1928 we could compete with the Northern Colorado and Nebraska feeders. At the present time our freight rate on lambs from Baker, Oregon, to Missouri River points over the Union Pacific is $1.37

per cwt. If we come down the Ogden gateway over the D&RGW and Santa Fe into the Arkansas Valley, our freight rate is $1.86 per cwt. This is 49 cents over the Colorado (Northern) and Nebraska feeders rate, or with tax and all, over $100.00 per car. That makes it impossible for us to compete" (Consol. R., I, 490, 491). In 1928 this association fed over 400,000 lambs in the Arkansas Valley. At present its members are feeding approximately 100,000 lambs (Consol. R., I, 491).

Angus McIntosh, Las Animas, Colorado, President of the Colorado Wool Growers Association, composed of 832 members, testified (Consol. R., I, 494) that "Ewe lambs are too valuable as 'killers or feeders' in the fall for Colorado sheepmen to hold over for herd replacements. He must and does look to other localities for such replacements where sheep raising does not produce fat lambs for immediate slaughter." Prior to 1932, a large part of the membership in the Colorado Wool Growers Association, having their operations along the Rio Grande, bought their herd replacements in the Northwest and enjoyed, at that time, through rates to Denver, Missouri River and eastern points via Ogden, thence Rio Grande and AT&SF, MP, CB&Q or CRI&P. Since 1932, the members of Mr. McIntosh's association can no longer compete with sheepmen in Wyoming and other states on the Union Pacific because of the lesser through rate via that line (Consol. R., I, 495). When this witness was purchasing sheep in Oregon (prior to 1932), he shipped via Ogden, thence via Rio Grande and AT&SF to Las Animas, and he had to feed only twice in transit via that route as against three and four feeds en route via Union Pacific to Denver, thence AT&SF (Consol. R., I, 496).

Don Clyde, Heber, Utah, is a livestock operator engaged principally in the production of sheep. He grazes his livestock on approximately 15 to 20 thousand acres

of private land, in addition to holding forest grazing permits. He operates about 4,000 breeding ewes and 200 head of cattle (Consol. R., I, 324). He estimates about 100,000 breeding ewes are in the vicinity of his operations. Most of the lambs produced by this witness move east to Denver and Kansas City. These ranges produce an extraordinary good fat lamb which are sold for slaughter. However, there is always a percentage of every sheepman's output which is sold as feeders. These usually go to midwestern states (Consol. R., I, 324).

Clyde brings in most of his herd replacements (breeding stock) from Idaho and Montana (Consol. R., I, 325). The ewes and lambs (pairs) are shipped in under a transit billing and then the billing is (later) picked up in sending lambs to market (Consol. R., I, 325). The buyers will reimburse the grower for the amount (of freight charges) he has already in the freight bill (Consol. R., I, 325, 326). An arbitrary charge of 19 cents (applicable via UP-Rio Grande through Heber to market) means that the returns to the Utah grower would be that much less than the returns to the grower located on the Union Pacific (Consol. R., I, 326). If the movement from this witness's location was to Kansas wheat pastures, combination rates would apply (Consol. R., I, 326).

Charles Redd, LaSal, Utah, testified in support of the complaint of the Rio Grande. His company had in late 1949 about 27 thousand head of sheep and about 2,000 head of cattle. He said that some of the best sheep in the country, for range purposes, come from eastern Oregon and western Montana, and the best fattening lambs come from Idaho. He would like to bring these sheep into Rio Grande territory on a transit basis (Consol. R., I, 375) at rates equal to those via Union Pacific (Consol. R., I, 376).

L. C. Montgomery, Heber, Utah, is engaged in the cattle business at that point, and is also Secretary of the Heber City Cattle Co. His individual operations and those of the latter company embrace about five thousand head of cattle (Consol. R., I, 442). Mr. Montgomery testified that his operations are substantially similar to those of Witness Clyde with this difference, Clyde operates mostly in sheep and he (Montgomery) in cattle (Consol. R., I, 442). He also testified as President of the Utah Cattle and Horse Growers Association (Consol. R., I, 444) which markets about 225,000 head of beef cattle each year. His association feels that opening the Ogden gateway would be beneficial to the producers in the State of Utah (Consol. R., I, 444) and that the burden of higher freight rates which they are now forced to pay in the movement of livestock from the Northwest via Ogden and D&RGW, when moving to eastern markets handicaps the growers and feeders on the Rio Grande (Consol. R., I, 444, 445). He further agreed that the handicap he has in mind is the difference between the combination rates applicable via the D&RGW and the through rates that exist via the Union Pacific (Consol. R., I, 445, 446).

Joe Fuller, Pocatello, Idaho, buys and sells livestock, principally sheep. At present he buys in Idaho, Oregon, Washington and Montana, and would like to do business in Colorado and Utah (Consol. R., I, 485, 486). He stated that he could not sell to Utah or Colorado sheep men on the same basis as he does to stockmen on the Union Pacific. He could enlarge his operation if rates were established via Ogden so that his entire purchase could be moved to Salt Lake or Ogden for sorting and grading, some going beyond to Colorado and Utah and some to California points (Consol. R., I, 486).

Roscoe C. Rich, of Burley, Idaho, engaged in the sheep business, spoke for the Idaho Wool Growers Association. He has been an officer in this organization, also the National Wool Growers Association and the American Wool Council. The Idaho Wool Growers filed a petition of intervention in behalf of complainant. Last year 8,000 sheep were sheared on his ranches and he stated that this was a low year (Consol. R., I, 509).

Rich stated that the demand for lambs is influenced by the availability of rail transportation. He stated that if lambs could move to Colorado with a feeding in transit arrangement at competitive through rates via Ogden it would benefit the growers of lambs in Idaho. This statement was based on his experience in this business which began in 1914. He stated that it would be to the best interests of Idaho to have all markets available at competitive freight rates (Consol. R., I, 512). He wanted to be able to ship any place where there is a logical market for his lambs at a competitive rate and cost (Consol. R., I, 515).

Lumber witnesses for the Rio Grande proved that they are restricted in their business operations because of their inability to ship lumber freely to and from the "closed door" territory. The Western Forest Industries Association intervened in behalf of its membership who ship lumber from mills in the Northwest and who are interested in a free and flexible routing to all points. The other three witnesses for the Rio Grande are located in Colorado and gave specific examples as to the restrictions placed on their businesses.

Reginald T. Titus (Consol. R., I, 215 *et seq.*), Executive Vice-President of Western Forest Industries Association, Portland, Oregon, testified for the membership of his organization. They are vitally interested

in having a flexibility of routing to all parts of the United States and believe they are discriminated against because they are unable to route lumber via Ogden and the Rio Grande from Union Pacific points at equal rates for shipment beyond. This factor affects their use of transit privileges at points in Utah and Colorado and other states. They believe that if the rates are granted it will increase the lumber consuming territory in which their products are marketed.

J. A. Hayley, Littleton, Colorado, Manager of the Monarch Lumber Company plant at Military Junction, Colorado, testified that he cannot, without competitive joint rates, transit lumber which originates on the Union Pacific and is handled by him at Military Junction, Colorado (Consol. R., I, 383). "Some of those mills we would like to buy from originate on the Union Pacific" (Consol. R., I, 383). He also testified that "As a business man he ought to be able to buy lumber off the Union Pacific at equal rates over available routes" (Consol. R., I, 385), and "We think we should be able to compete with competitors within 10 miles of us (*i.e.*, Denver) who are on a through rate on the Union Pacific (Consol. R., I, 386).

Floyde H. Hughes, Grand Junction, Colorado, is Purchasing Agent for the Independent Lumber Company which operates 14 retail lumber yards in Western Colorado, also (at Grand Junction) a wholesale distribution yard, a box factory, a lumber manufacturing plant, and a storing and drying yard covering about 13 acres. The Independent Lumber Company is also financially interested in the Crissey and Fowler Company at Colorado Springs, Colorado. Hughes testified (Consol. R., I, 518, 519) that in procuring lumber for his transit plant at Grand Junction, he prefers to purchase lumber on railroads other than the Union Pacific

because when the inbound routing on lumber is via these (other) lines, he enjoys competitive rates to Colorado common points and beyond. Cascade and Winchester, Idaho, and Burns, Oregon, were mentioned as typical points on the Union Pacific from which his company has procured lumber in the past, but could not do a transit business into such a point as Coloradio Springs or beyond with lumber originating at the Union Pacific points mentioned (Consol. R., I, 518, 519). He further testified that he gets about 300 carloads of lumber a year from the Northwest, that his plants can handle from 1 to 2 carloads a day, and he feels that the operation, in order to expand, must seek additional markets since his present market in Western Colorado is limited. If his inbound materials originate on the Union Pacific, he is limited to Western Colorado in his transit operations, and he feels that he should have the same rates as his competitors have to competitive areas of destination (Consol. R., I, 520, 521).

This witness also testified that, in some cases where the present rate on lumber to Grand Junction applies via Burlington Lines to Denver, thence Rio Grande, he would get a reduction in his present rate if the through competitive rates to Denver were established via the Rio Grande through Ogden. He showed that the 71-cent rate (to Denver) applied both via GN to Laurel, Montana, thence CB&Q or CB&Q-C&S to Denver, as well as via GN, Butte, UP. If the rate applied GN, Butte-UP, Ogden, D&RGW, the rate to Grand Junction would then become 71 cents instead of 80 cents which is now the rate via GN-CB&Q or CB&Q-C&S, Denver, D&RGW (Consol. R., I, 525).

Hughes also testified as to his company's need for partial unloading privileges at competitive rates (Consol. R., I, 523). He described an instance where, in

endeavoring to divide a carload of doors between Grand Junction and Colorado Springs, which car was to be shipped from Tacoma, Washington, via UP, he had to divert the car to the Great Northern out of Tacoma because the through rate via that line is not applicable via Union Pacific. The shipper charged him a penalty of $25.19 which was the amount the shipper figured he lost because of the inapplicability of the inbound Union Pacific transit credit at Tacoma (Consol. R., I, 523, 524). He also described a similar disability which he faced in trying to divide a carload of screen doors between Colorado Springs and Grand Junction which traffic originated at Hoquiam, Washington. He stated that he would probably have to crate the doors from Colorado Springs at Grand Junction and ship them by common carrier truck to their yard at that point (Consol. R., I, 524).

This company is sometimes forced to go to mills located on the Union Pacific for supplies at its Grand Junction plant because of price and quality (Consol R., I, 526) and when this is done, he cannot move such lumber out of storage to his yard at Colorado Springs except at combination rates because of the absence of joint through rates from Cascade and Winchester, Idaho, by way of Grand Junction. The Colorado Springs yard once had to procure 10 carloads from a competitor (at disadvantage) because it would have cost an additional 46 cents per cwt. to move Union Pacific lumber into Colorado Springs from Grand Junction storage (Consol. R., I, 526, 527).

Robert C. Johnson, of Denver, Colorado, is District Manager, Wood Preserving Division of the Koppers Company, which has plants at Salida, Colorado on the Rio Grande and at Denver served through a belt line by either the Rio Grande or the Union Pacific. The testimony of Johnson relates to the plant at Salida which

is engaged in the preservation and treatment of lumber (Consol. R., I, 417). The lumber treated at Salida originates in the States of Colorado, New Mexico, Utah, Washington and Oregon. The lumber that is shipped from Washington and Oregon moves via the Southern Pacific or the Western Pacific and the Rio Grande (Consol. R., I, 417). Johnson testified that about 60 per cent of the lumber treated at Salida moves to points east, south and southeast beyond the state of Colorado (Consol. R., I, 418). He also stated that this plant would use lumber from such points as Baker and Burns, Oregon, if the joint competitive rates sought in this proceeding were established (Consol. R., I, 418).

Since as stated about 60 per cent of the lumber treated at Salida moves eastbound beyond the state of Colorado, the Salida plant cannot purchase lumber at points served by the Union Pacific in Oregon or other states northwest of Oregon without the risk of paying combination rates. Johnson also stated that his company favors the establishment of the competitive rates sought, because the Salida plant needs a large range of flexibility in securing lumber for treatment at that point, and that with such flexibility the plant would gain in production and often in price if the joint rates involved were established (Consol. R., I, 417, 418). In other words, the Koppers Company would like to be in position to buy lumber for treatment at Salida regardless of the source of the lumber or the originating railroad (Consol. R., I, 419). The plant of the Koppers Company at Denver is not restricted in the same manner as is the plant at Salida, because, as already stated, it is served by the Union Pacific as well as by the Rio Grande and lumber may therefore be moved from points on the Union Pacific in Idaho, Oregon, etc., for treatment at Denver at competitive rates (Consol. R., I, 419).

J. Arthur Knudsen, of Salt Lake City, Utah, President and General Manager of Knudsen Builders Supply Company, receives 400 to 500 cars per year in the conduct of his business, 150 to 200 from the East. These cars contain roofing, insulation, wallboard and a full line of building material, originate at various points in the United States from Missouri on the west to the Atlantic Seaboard on the east and from Minnesota on the north to the Gulf on the south, and are consigned to various dealers and branches of his company in western Colorado, Utah and Idaho. Frequently these are pool cars, as in the case of Celotex moving from Louisiana. Such cars contain about 56,000 feet of this product and are stopped four or five times en route for partial unloading. He cannot always time his shipments for his western Colorado customers (Grand Junction, Colorado, for example) (Consol. R., I, 206) with cars that are *not* consigned north of Ogden, which precludes the possibility of servicing his Colorado customers in such cars (Consol. R., I, 204-207).

Knudsen testified (Consol. R., I, 207) that if the competitive rates were established he would be able to give better service to his customers in the western part of Colorado and effect savings for them on numerous occasions, would help to build up their financial capacity and their efficiency, which in turn would enable Knudsen to increase his business with them. He also testified that by the same token he cannot freely use the route of the Rio Grande on carloads consigned to certain customers at Salt Lake City because many of these cars are consigned to Pocatello and other points in Idaho and Oregon in the "closed door" territory and that when such reconsignments occur, the shipments would be subject to the excessive combination through rates instead of the competitive through rates.

Knudsen also testified (Consol. R., I, 210): "We have

to pass up business as far east as Glenwood Springs, Colorado, due to the fact that we couldn't so route the cars in order to accommodate those customers with the tonnages they could accept and pay for." He also said (Consol. R., I, 212, 213) that of the 150 cars moving from the east, the maximum number he would want to stop in transit to partly unload at points in Colorado on the D&RG would be 25 per cent.

M. S. Rosenblatt is President and General Manager of the Structural Steel and Forging Company of Salt Lake City, Utah. He testified in support of the complaint of the Rio Grande. His company has a warehouse and fabricating plant in Salt Lake City served by the Rio Grande. Steel is shipped into his plants from the Pacific coast, from Geneva, Utah, from Chicago, Pittsburgh and other points in the eastern United States (Consol. R., I, 221, 222). For the first ten months of 1949 he received 105 inbound cars from the east. He said that "all steel originating in the east comes over the Union Pacific Railroad and is transferred here at Salt Lake City for delivery at our plant" (Consol. R., I, 222). He stated that he routes all of the business to Salt Lake City via Union Pacific "primarily because we have no transit privileges for fabricating on any steel moving from eastern points via the D&RG. I mean by that, transit privileges into areas which take approximately 50 per cent of our business, Idaho particularly, and parts of Montana. It is impossible for us to use tonnage coming in on the D&RG, fabricating the steel, and then competing in the Idaho and Montana market," also, "when the steel is ordered, * * *, we have no way of knowing where the final destination is liable to be. Therefore, we can't take a chance on bringing in steel which we might have to fabricate and furnish in markets to which the D&RG tonnage would carry no fabrication in transit privileges" (Consol. R., I, 223).

Lorenzo J. Bott, of Brigham, Utah, testified in support of the complaint of the Rio Grande. He is a fabricator and wholesaler of granite and marble, chiefly used for monuments and tombstones (Consol. R., I, 388-397). Granite, which he sells, comes in semi-finished blocks from several points, one for example, being Tate, Georgia. He also gets marble from Vermont. He has a dealer in Grand Junction, Colorado, whom he cannot always supply with stone, marble or granite originating at these and other points in part carload lots, since the cars almost invariably contain some material for either Brigham or for other customers located in Utah, Idaho or Montana north and west of Ogden. If he can do so, he ships cars with some tonnage for Grand Junction in them, but the difficulty is that such cars must terminate on the Rio Grande and he can seldom do this. The only alternative is to ship to Grand Junction in LCL lots, the cost of which is prohibitive.

W. H. Snyder, Grand Junction, Colorado, a retail dealer in monuments, supported Bott's testimony (Consol. R., I, 398 *et seq.*)

Bott sells marble to Snyder, and other customers which originates, for example, at Tate, Georgia. Because of the cost of an entire carload of marble, or granite from Barre, Vermont, it frequently happens that Snyder has to forego the business because Bott cannot readily sell him a part-car (stop in transit at Grand Junction to partially unload) since the cars almost invariably contain tonnage for other Bott customers north of Ogden, including Bott's own operation at Brigham. Such part-car shipments as Snyder gets have to be included in cars which terminate on the Rio Grande. The alternative for Snyder is to pay LCL rates which are prohibitive (Consol. R., I, 399). If he had to ship everything LCL, he would close down (Consol. R., I, 403).

Kenneth G. Self, Salt Lake City, is the majority stockholder in the Inter-Mountain Tractor Sales Corporation, whose place of business at Salt Lake City is located on the tracks of the Rio Grande. He likewise supports the complaint of the Rio Grande. His concern is the distributor for Ford tractors and Dearborn farm equipment for Utah, southeastern Idaho and portions of Nevada and Wyoming (Consol. R., I, 458). He ships into Salt Lake City in carload lots and distributes from there to his dealers by his own truck (Consol. R., I, 459). Fifty per cent of his customers are located in Idaho. He originally purchased the truck during the post-war period when shortages made allocation of machinery necessary (Consol. R., I, 459, 460). Then it was necessary to limit dealers to a part of a carload and he found out that cars which were brought into Utah over the Rio Grande could not be stopped in transit at Salt Lake for partial unloading and reforwarded at the through rate to Idaho Falls for example (Consol. R., I, 460).

Rather than be faced with such situations, he bought a motor transport and has served his territory from Salt Lake since then by means of this equipment (Consol. R., I, 460). If he could partially unload in both states, he would use the railroads and discontinue his trucking (Consol. R., I, 460). He bought trucks for this operation because he did not have a competitive joint rate (via Rio Grande) from eastern points to points in Utah and Idaho (Consol. R., I, 460, 461). He serves Logan and Tremonton, Utah; Preston, Burley, Boise and Nampa, Idaho; all points on the Union Pacific north and west of Ogden (Consol. R., I, 461). He also serves some inland dealers adjacent to Price, Utah, on the Rio Grande (Consol. R., I, 464). He has no customers in Idaho today who would take over a partial carload (Consol. R., I, 464).

D. G. Adams, of Salt Lake City, Utah, is Branch Manager of the branch of the J. I. Case Company at that point. This branch is served by the tracks of the Rio Grande. The J. I. Case Company produces agricultural implements and farm machinery at points in Wisconsin, Illinois, Iowa and Alabama. The Salt Lake branch is the distribution point for these products in the intermountain territory. About 70 per cent of these products are destined to points in Utah north of Salt Lake City and to points in Idaho, and eastern Oregon, and about 30 per cent are destined to other parts of Utah and western Colorado (Consol. R., I, 543). Adams has only recently been put in charge of the Salt Lake branch and as yet is not entirely familiar with the potentialities of the territory in which his branch is interested (Consol. R., I, 549).

Although the Salt Lake City branch is served by the tracks of the Rio Grande, Adams testified that to be on the safe side all shipments from the East to Salt Lake City should be routed via the Union Pacific, and that most of them are, because if they are routed to Salt Lake City via the Rio Grande and are then reshipped to points on the Union Pacific in Idaho, northern Utah, etc., the combination rates will apply. However, Adams stated that his company recognizes that to route all shipments of the Salt Lake City branch via the Union Pacific would be unfair to the Rio Grande, and therefore on occasion shipments are routed to Salt Lake City via the Rio Grande (Consol. R., I, 550, 551).

Adams testified as to an example which hindered his operations and affected him adversely. A carload of plows moving from the east to Salt Lake City by the Rio Grande were needed badly at Idaho Falls. These plows could not be diverted to Idaho Falls at the competitive joint rates, so they were rebilled after arrival at Salt Lake to Idaho Falls, and it cost ap-

proximately $300.00 extra freight to do this (Consol. R., I, 545).

Another instance was given by Adams as to injuries suffered by his branch operations because of the lack of competitive joint rates which the complainant seeks. A carload of tractors was en route from the east to Salt Lake City which contained two tractors of the type needed by his Ontario, Oregon, dealer and Adams told the dealer he would unload all the tractors from this car at Salt Lake, except two, and then divert the car to Ontario. However, the car was moving to Salt Lake City via Rio Grande and the two tractors for Ontario were shipped by truck from Salt Lake City at a cost of about $50.00 apiece, which represents the loss to the J. I. Case Company (Consol. R., I, 545). Opening of the Ogden gateway at competitive rates would enable Adams to stop cars in western Colorado en route to Salt Lake, as well as en route to Idaho and reship them to Idaho, Oregon, etc., without the extra freight now imposed (Consol. R., I, 544).

Line No.	BETWEEN Seattle . . . Wash. and	ROUTES Following routing arranged for eastbound movement; for westbound movement use reverse routing.	MILEAGES UP Long-Haul	UP Short-Haul	UP To or From Ogden	Thru
1	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1954			2439
2		UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P		184		3541
3		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			1027	2651
4	Kansas City . . . Mo.	Union Pacific	2069			2069
5		UP-Portland Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P		184		2529
6		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P			1027	2269
7	Jacksonville . . . Fla.	UP-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL-Atlanta, Ga., ACL	2069			3303
8		UP-Portland, Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL-Atlanta, Ga., ACL		184		3763
9		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL-Atlanta, Ga., ACL			1027	3503
	BETWEEN Centralia . . . Wash. and					
10	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1862			2347
11		UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P		92		3450
12		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			935	2559
13	St. Louis . . . . . Mo.	UP-Kansas City, Mo., Wabash	1977			2251
14		UP-Portland, Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash		92		2711
15		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash			935	2451
16	Atlanta . . . . . Ga.	UP-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL	1977			2856
17		UP-Portland, Ore., SP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL		92		3316
18		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash-St. Louis, Mo., L&N-Nashville, Tenn., NC&StL			935	3056
	BETWEEN Barnes . . . . . Ore. and					
19	Chicago . . . . . Ill,	UP-Council Bluffs, Ia., C&NW	1777			2262
20		UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P		7		3364
21		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			850	2474
22	Pittsburgh . . . . Pa.	UP-Council Bluffs, Ia., C&NW-Chicago, Ill., PRR	1777			2730
23		UP-Portland, Ore., SP-Santa Rosa, N.M., CRI&P-Chicago, Ill., PRR		7		3833
24		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q-Chicago, Ill., PRR			850	2942
25	Detroit . . . . Mich.	UP-Council Bluffs, Ia., C&NW-Chicago, Ill., NYC	1777			2547
26		UP-Portland, Ore., SP-Ogden, Utah, UP-Council Bluffs, Ia., C&NW-Chicago, Ill., NYC		7		2873
27		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q-Chicago, Ill., NYC			850	2759
	BETWEEN Pendleton . . . Ore. and					
28	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1560			2045
29		UP-Wallula, Wash., NP-Minneapolis, Minn., CStPM&O-C&NW		70		2120
30		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			633	2257
31	Oklahoma City . Okla.	UP-Denver, Colo., AT&SF	1144			1876
32		UP-Wallula, Wash., NP-Fargo, N.D., CMStP&P-Sioux Falls, S.D., CStPM&O-C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		70		2602
33		UP-Ogden, Utah, D&RGW-Pueblo, Colo., AT&SF			633	1910
34	St. Louis . . . . . Mo.	UP-Kansas City, Mo., Wabash	1674			1948
35		UP-Spokane, Wash., SI-CP-Soo, Minneapolis, Minn., CRI&P-Des Moines, Ia., Wabash		227		2317
36		UP-Ogden, Utah, D&RGW-Denver, Colo., CRI&P-Kansas City, Mo., Wabash			633	2149

Line No.	BETWEEN Connell . . . . Wash. and	ROUTES Following routing arranged for eastbound movement; for westbound movement use reverse routing.	MILEAGES UP Long-Haul	UP Short-Haul	UP To or From Ogden	Thru
37	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1742			2227
38		UP-Spokane, Wash., SI-CP-Soo		119		2048
39		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			814	2438
40	New Orleans . . . La.	UP-Kansas City, Mo., KCS-Shreveport, La., L&A	1856			2728
41		UP-Spokane, Wash., GN-Minneapolis, Minn., CRI&P-DesMoines, Ia., Wabash-St. Louis, Mo., IC		119		2847
42		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC-Ft. Worth, Tex., T&P			814	2693
43	Ft. Worth . . . . Tex.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1326			2126
44		UP-Spokane, Wash., GN-Sioux City, Ia., C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., MKT		119		2490
45		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC			814	2159
	BETWEEN Cheney . . . . Wash. and					
46	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1769			2254
47		UP-Spokane, Wash., SI-CP-Soo		17		1957
48		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			842	2466
49	Ft. Worth . . . . Tex.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1354			2154
50		UP-Spokane, Wash., SI-CP-Soo, St. Paul, Minn., CRI&P-Kansas City, Mo., M-K-T		17		2498
51		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC			842	2187
52	Oklahoma City . Okla.	UP-Denver, Colo., AT&SF	1354			2086
53		UP-Spokane, Wash., GN-Sioux City, Ia., C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		17		2224
54		UP-Ogden, Utah, D&RGW-Pueblo, Colo., AT&SF			842	2119
	BETWEEN Colfax . . . . Wash. and					
55	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1756			2241
56		UP-Plummer, Idaho, CMStP&P		54		1888
57		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			829	2453
58	Oklahoma City . Okla.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1354			2154
59		UP-Spokane, Wash., GN-Sioux City, Ia., C&NW-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		88		2295
60		UP-Ogden, Utah, D&RGW-Pueblo, Colo., AT&SF			829	2106
61	New Orleans . . . La.	UP-Kansas City, Mo., KCS-Shreveport, La., L&A	1871			2743
62		UP-Spokane, Wash., SI-CP-Soo-St. Paul, Minn., CB&Q-St. Louis, Mo., IC		88		2842
63		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC-Ft. Worth, Tex., T&P			829	2708
	BETWEEN and Lewiston . . . Idaho					
64	Chicago . . . . . Ill.	UP-Council Bluffs, Ia., C&NW	1772			2257
65		UP-Marengo, Wash., CMStP&P		132		2054
66		UP-Ogden, Utah, D&RGW-Denver, Colo., CB&Q			845	2469
67	New Orleans . . . La.	UP-Kansas City, Mo., KCS-Shreveport, La., L&A	1887			2759
68		UP-Spokane, Wash., GN-Minneapolis, Minn., CRI&P-DesMoines, Ia., Wabash-St. Louis, Mo., IC		193		2921
69		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC-Ft. Worth, Tex., T&P			845	2724
70	Ft. Worth . . . . Tex.	UP-Denver, Colo., C&S-Sixela, N.M., FW&DC	1356			2156
71		UP-Wallula, Wash., NP-Fargo, N.D., CMStP&P-Sioux Falls, S.D., CStPM&O-Omaha, Neb., CB&Q-Kansas City, Mo., M-K-T		143		2839
72		UP-Ogden, Utah, D&RGW-Pueblo, Colo., C&S-Sixela, N.M., FW&DC			845	2190

Nos. 117, 118, 119, 332, 333 and 334

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED REPLY BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

FRANK E. HOLMAN, 1006 Hoge Building, Seattle 4, Washington.
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Attorneys for The Denver and Rio Grande Western Railroad Company.

THE ARGUS PRESS, SEATTLE

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